DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-8145
Title: Juan Smith, Petitioner
v.
Burl Cain, Warden
Docketed: December 30, 2010
Lower Ct: Orleans Parish Criminal District Court of Louisiana
Case Nos: (378-343)
Decision Date: February 2, 2009
Discretionary Court
Decision Date: September 24, 2010
Questions
Presented:

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 20 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 31, 2011)
Jan 31 2011	Waiver of right of respondent Louisiana to respond filed.
Feb 10 2011	DISTRIBUTED for Conference of February 25, 2011.
Feb 17 2011	Response Requested. (Due March 21, 2011)
Mar 21 2011	Brief of respondent Louisiana in opposition filed.
Mar 31 2011	DISTRIBUTED for Conference of April 15, 2011.
Mar 31 2011	Reply of petitioner Juan Smith filed. (Distributed)
Apr 7 2011	Record Requested.
May 9 2011	Record received from the Supreme Court of Louisiana (one box).
May 18 2011	DISTRIBUTED for Conference of June 2, 2011.
May 25 2011	Record received from Criminal District Court Parish of Orleans (2 boxes).
Jun 6 2011	DISTRIBUTED for Conference of June 9, 2011.
Jun 13 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jul 6 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 12, 2011.
Jul 6 2011	The time to file respondent's brief on the merits is extended to and including September 26, 2011.
Jul 21 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 28 2011	Eight volumes of record received from the Supreme Court of Louisiana. (1 box)
Aug 8 2011	SET FOR ARGUMENT ON Tuesday, November 8, 2011.
Aug 12 2011	Brief of petitioner Juan Smith filed.

Aug 12 2011	Joint appendix filed
Aug 19 2011	CIRCULATED
Aug 19 2011	Brief amicus curiae of Innocence Network filed. (Distributed)
Aug 19 2011	Brief amicus curiae of Orleans Public Defenders Office filed. (Distributed)
Aug 19 2011	Brief amicus curiae of American Bar Association filed. (Distributed)
Aug 19 2011	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Sep 26 2011	Brief of respondent Burl Cain, Warden filed. (Distributed)
Oct 3 2011	Brief amicus curiae of National District Attorneys Association filed. (Distributed)
Oct 20 2011	Reply of petitioner Juan Smith filed. (Distributed)
Nov 8 2011	Argued. For petitioner: Kannon K. Shanmugam, Washington, D. C. For respondent: Donna R. Andrieu, Assistant District Attorney, New Orleans, La.

PETITION FOR WRIT OF CERTIORARI

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2010

JUAN SMITH,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CRIMINAL CASE

QUESTIONS PRESENTED FOR REVIEW

In this Louisiana criminal case, the state trial court, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court, without making any factual findings, or providing any reasons for their rulings, denied Petitioner Juan Smith post-conviction relief. Smith contends that the Louisiana state courts reached this result only by disregarding firmly-established precedents of this Court regarding suppression of material evidence favorable to a defendant and presentation of false or misleading evidence by a prosecutor.

I. **Is there a reasonable probability that, given the cumulative effect of the *Brady* and *Napue/Giglio* violations in Smith's case, the outcome of the trial would have been different?**

II. **Did the Louisiana state courts ignore fundamental principles of due process in rejecting Smith's *Brady* and *Napue/Giglio* claims?**

Petitioner Juan Smith respectfully requests that this Court issue a writ of certiorari to review the decision of the Louisiana Supreme Court.

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. Juan Smith, Plaintiff/Appellant

2. Burl Cain, Warden, Louisiana State Penitentiary

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2010

JUAN SMITH,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

Petitioner Juan Smith respectfully requests that this Court issue a writ of certiorari to review the judgment of the Louisiana state courts and address the important questions of federal constitutional law presented.

OPINIONS DELIVERED IN THE COURT BELOW

The oral judgment of the Orleans Judicial District Court, Orleans Parish, Louisiana, issued on February 2, 2009, is attached as Appendix A. The Louisiana Fourth Circuit Court of Appeal's denial of Petitioner's application for review, issued on April 29, 2009, is attached as Appendix B. The unpublished opinion of the Louisiana Supreme Court denying Petitioner's application for a supervisory writ of review issued on September 24, 2010 and is reported at *State v. Smith*, 2009-1164 (La. 09/24/10); 45 So.3d 1065. It is attached as Appendix C.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Louisiana Supreme Court issued its denial of Petitioner's application for a supervisory writ of review issued on September 24, 2010 and that order became final on that date. The Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves §1 of the Fourteenth Amendment, reading in relevant part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, §1.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2010

JUAN SMITH,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary

Respondent.

ARGUMENT ON PETITION FOR CERTIORARI, AND REASONS FOR GRANTING THE WRIT

STATEMENT OF THE CASE

A. Procedural History

On August 31, 1995, Juan Smith was indicted for five counts of first-degree murder. The trial court denied Mr. Smith's motions to suppress the evidence and identification on October 31, 1995. Mr. Smith went to trial in December 1995, and was convicted of five counts of first-degree murder on December 7, 1995. The trial court sentenced Mr. Smith to life imprisonment without the benefit of parole on December 15, 1995.

Laura Pavy was appointed to represent Mr. Smith on direct appeal. Mr. Smith's conviction and sentence were affirmed by the Louisiana Fourth Circuit Court of Appeal on July 18, 2001. Petitioner timely filed an application for writ of review with the Louisiana Supreme Court on August 22, 2001. The Louisiana Supreme Court denied the application for writ of review on September 13, 2002. Mr. Smith filed for a writ of certiorari to the United States Supreme Court and was denied on February 24, 2003.

On February 6, 2004, Mr. Smith filed his first Application for Post-Conviction Relief with Memorandum in Support, as well as a Motion for Leave to Supplement and/or Amend the Original Application for Post-Conviction Relief, and a Motion to Hold the Pro Se Application for Post-Conviction Relief in Abeyance Until Counsel is Assigned to Handle Applicant's Death Sentence Case.

On June 27, 2008, Kathy Kelly was enrolled as counsel of record for the purpose of amending Petitioner's first Application for Post-Conviction Relief, with the agreement of all parties. Petitioner timely filed the supplemental post-conviction petition on August 27, 2008. The State filed a reply brief on October 2, 2008. The District Court ordered hearings on the *Brady*, *Napue*, and *Giglio* claims, which were held January 13, 14, 22 and February 2, 2009.

The district court orally denied relief on Mr. Smith's post-conviction petition on February 2, 2009, without issuing a written opinion, making any factual findings, or providing any reasons for its ruling. *See* Appendix A. On February 2, 2009, Petitioner orally moved to seek writs to the Fourth Circuit Court of Appeal. Petitioner further requested a return date of March 2, 2009 and asked that all further post-conviction proceedings be stayed pending the resolution of the writ application. Also on February 2, 2009, the district court orally set a return date of March 2, 2009 for Petitioner to seek supervisory writs.

On March 2, 2009, Petitioner filed an application for supervisory review in the Louisiana Fourth Circuit Court of Appeal. On April 29, 2009, the Fourth Circuit Court of Appeal denied the application for review. *See* Appendix B.

On May 28, 2009, Petitioner filed an application for supervisory review in the Louisiana Supreme Court. On September 24, 2010, the Louisiana Supreme Court denied the application for review. *See* Appendix C. Petitioner's Petition for a Writ for Habeas Corpus was timely filed

in the United States District Court for the Eastern District of Louisiana on October 7, 2010 and is currently pending.

This writ is timely filed.

B. Statement of Facts

Events Leading Up to Trial

On February 4, 1995, sometime in the evening after 8:00 pm, Tangie Thompson, her boyfriend, Andre White and her three-year-old child were killed in their residence on Morrison Road in New Orleans, Louisiana.[1]

Another seemingly unrelated murder occurred on March 1, 1995. On that evening, sometime after 8:30 p.m., three armed gunmen entered the home of Reba Espadron on North Roman Street in New Orleans. Six people were ordered by three armed black men to lie on the floor. Five people were shot multiple times and died as a result. Four victims were found inside the home and another was found outside, toward the back of the house. One of the victims, Shelita Russell, was severely injured but conscious after the attack. She was interviewed by police, and this interview was never turned over to the defense. Ms. Russell died several days after the offense as a result of her wounds.

Reba Espadron and Reginald Harbor, who were in a back bedroom of the house during the incident, were not injured. Larry Boatner also survived—he was not shot, but suffered a laceration to his head when one of the gunmen struck him on the head when he did not comply with the gunman's demands. All survivors were interviewed by the New Orleans Police Department and provided statements detailing the incident.

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[1] Juan Smith was convicted and sentenced to death for these murders after his conviction in the instant case. The conviction in the instant case was introduced by the State as an aggravator in the penalty phase of the capital trial. Herein this petition the capital case will be referred to as "Morrison Road" and the non-capital conviction in the instant case is referenced as "Roman Street."

Larry Boatner told police that he opened the door to the Espadron residence and saw three armed black men get out of a white four-door car with a loud muffler and enter the Espadron residence. The men demanded money, and one man hit Boatner on the head. The gunmen made the occupants of Espadron's home lie down on the floor and then started shooting. In an interview with the police, Boatner described the guns used by the perpetrators as an AK assault rifle, a Tech-Nine handgun, and a silver handgun, but could not supply any other information on the guns or the perpetrators. In fact, Boatner told police he was "too scared to look at anybody," and thus could not provide a more detailed description of the assailants. Ex. 1, DA File, at 4284-86.

Phillip Young also survived the shootings, but was identified as one of the perpetrators of the shootings because he was unknown to Reba Espadron and Larry Boatner. Young was shot in the incident and was initially unable to give police any information about what had occurred due to his severe injuries. Police recovered a beeper from Young, and learned the message "187" had been sent to Young's beeper from Kintaid Phillips' address shortly before the murders. Ex. 1, DA File, at 3737. 187 is the police code used for murder in California, and is a commonly used slang term for murder. *Id.*

Police interviewed Michelle Branch, Phillip Young's girlfriend, about her knowledge of the Roman Street murders. Ex. 1, DA File, at 3751; 3759; 4301-06. The Michelle Branch interviews were never disclosed to defense counsel. Ms. Branch told police that Phillip Young used her car on March 1, 1995, the day of the Roman Street murders, and that Young never returned with her car. *Id.* Ms. Branch described her car as a "light yellow" LeBaron which at night "would look white." Ex. 1, DA File, at 3759; 4301-06. Michelle's car "didn't have a muffler." Ex. 1, DA File, at 4302. Michelle also told police that she had received phone calls

telling her that Kintaid Phillips was driving her car in the Calliope Housing Projects after the Roman Street shootings. *Id.* Ms. Branch also told police she heard rumors that Kintaid Phillips was responsible for the Roman Street murders. Ex. 1, DA File, at 3751.

Pursuant to this information, police conducted an extensive police investigation into the Roman Street murders, wherein they focused their attention on Kintaid Phillips and his known associates, including Donielle Bannister. Ex. 1, DA File, at 3755-3756. However, neither Reba Espadron nor Larry Boatner could identify anyone from thirteen photographic line-ups that included all known associates of Phillips and Bannister. R. 94. Notably, Juan Smith's photograph was never included in the photographic line-ups as an associate of Phillips and Bannister. Both the Morrison Road and Roman Street cases stalled as police could not gather enough evidence to arrest the main suspects in either of the cases.

Then, on May 6, 1995, three individuals—Robert Trackling, Romalice McGhee, and Donielle Bannister—were arrested and charged with the attempted murder of Carol Firth, a 13-year-old girl, in the city of New Orleans.

While incarcerated for the attempted murder charge, Robert Trackling shared a cell with Eric Rogers at the Orleans Parish Prison. On May 19, 1995, Eric Rogers gave a police statement in which he stated that Robert Trackling had confessed to Rogers about his involvement in the Morrison Road and North Roman Street murders. The State never disclosed Trackling's involvement to the defense. Trackling was never charged with the Roman Street murders despite his own admission that he committed these crimes. Instead, he entered into an agreement with Assistant District Attorney Rodger Jordan which provided Trackling with a very favorable deal in exchange for his testimony against Juan Smith in the Morrison Road trial.

Even as the State concealed Trackling's involvement in the Roman Street murders, New Orleans Police Department Detective John Ronquillo developed a photographic lineup that included Juan Smith based upon Trackling's statement. Detective Ronquillo presented the lineup to Reba Espadron, who was unable to identify Juan Smith as one of the perpetrators. A few days later, on June 7, 1995, an article appeared in the Times Picayune that included a photograph of Mr. Smith and Kintaid Phillips, stating they were wanted for the Morrison Road murders.

Police approached Larry Boatner with a photographic line-up containing Juan Smith's picture. Boatner ultimately identified Mr. Smith from the photo line-up, but the State failed to disclose the true circumstances that led to Juan Smith's identification.

When Detective Ronquillo approached Mr. Boatner with the photographic line-up, Mr. Boatner was housed in a psychiatric ward at Charity Hospital, where he was being treated for alcohol abuse. When Boatner viewed the line-up he knew that the suspected perpetrator's photograph was included. Boatner told staff at Charity Hospital that he heard from friends that police had identified the suspected killers in the Roman Street murders, but that they were not yet in custody. At the time Boatner made the statement, only the New Orleans Police Department knew Trackling had implicated Juan Smith and Kintaid Phillips for the crime. Boatner could only have learned this information from Espadron, who had been previously pressured by Detective Ronquillo to identify Juan Smith as one of the perpetrators. Boatner was thus pressured to identify someone he knew the police believed was responsible.

The day he made the identification, Boatner told medical staff that he felt confused, overwhelmed and afraid. Ex. 1, DA File, at 2079, 2099. He also complained that he was being

harassed by Detective Ronquillo to make an identification of the Roman Street perpetrator. Post-Conviction Ex. 1, DA File, at 2079.

After going through thirteen other line-ups with numerous other suspects, the NOPD arrested Juan Smith in August, 1995, a full five months after the Roman Street murders. Mr. Smith was charged with first-degree murder for both the Morrison Road and the Roman Street murders. His co-defendants in the Morrison Road case (Donielle Bannister, Kintaid Phillips and Robert Trackling) were not arrested or charged in the Roman Street murders.

REASONS FOR GRANTING THE WRIT

I. There is a Reasonable Probability that the Cumulative Effect of the *Brady*,[2] *Napue*[3] and *Giglio*[4] Violations in this Case Would Have Changed the Outcome of the Proceedings

A. The History of *Brady* Violations in Orleans Parish

> "The previous administration had a policy of keeping away as much information as possible from the defense attorney."
>
> –Orleans Parish District Attorney Eddie Jordan, on the former District Attorney responsible for prosecuting this case.[5]

The Orleans Parish District Attorney's Office under former District Attorney Harry Connick's reign has a well-documented history of hiding exculpatory evidence from defense counsel.[6] In the same year of Petitioner's arrest, this Court admonished the Orleans Parish

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[2] 373 U.S. 83 (1963).
[3] 360 U.S. 264 (1959).
[4] 405 U.S. 150 (1972).
[5] *Jordan targets backlog of cases; Volunteer lawyers to pitch in, DA says*, TIMES-PICAYUNE, Feb. 25, 2003, at National 1.
[6] The history of the Orleans Parish District Attorney's *Brady* violations began before and continued after Mr. Smith's' trial. They include *Kyles v. Whitley*, 514 U.S. 419, 441 (1995); *Monroe v. Blackburn*, 607 F.2d 148 (5th Cir. 1979); *Davis v. Heyd*, 479 F.2d 446 (5th Cir. 1973); *State v. Brigh*, No. 2002-2793 (La. 01/30/04); 864 So.2d 638; *State v. Cousin*, No. 96-2973 (La. 4/14/98); 710 So.2d 1065 (in capital murder case, "[t]he prosecutor did not disclose this obviously exculpatory statement to the defense prior to the trial"); *State v. Lindsey*, 02-2363 (La. App. 4 Cir. 4/2/03); 844 So.2d 961; Michael Perlstein, *Jordan drops charges in 1975 murder. Two men freed on eve of*

District Attorney's Office about its cavalier attitude toward the disclosure of exculpatory evidence:

> Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

Kyles v. Whitley, 514 U.S. 419, 439 (1995).

Indeed, of the seven men exonerated from Louisiana's death row since 1981, four were prosecuted in Orleans Parish, and all four of these cases – *Kyles*, *Cousin*, *Thompson* and *Bright* – involved serious *Brady* violations.[7]

Rather than heeding this Court's directive in *Kyles*, the Orleans Parish DA's office continued its pattern of deceit by concealing material, exculpatory evidence from the defense in the instant case.

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retrial, TIMES-PICAYUNE, June 24, 2003, at B-1; *State v. Thompson*, 02-0361 (La. App. 4 Cir. 7/17/02), 825 So.2d 552; Gwen Filosa, *N.O. man cleared in '84 murder; New trial in Liuzza killing brings an emotional end to epic case*, TIMES-PICAYUNE, May 9, 2003, at A-1 (after retrial, Thompson acquitted in less than one hour); *State v. Lee*, 00-2429 (La. App. 4 Cir. 1/4/01), 778 So.2d 656; *State v. Marshall*, 81-3115 (La. App. 4 Cir. 9/5/95), 660 So.2d 819; *State v. Mims*, 94-0333 (La. App. 4 Cir. 1994); 637 So.2d 1253; *State v. Falkins*, 356 So.2d 415 (La. 1978); *State v. Parker*, 361 So.2d 226 (La. 1978); *State v. Curtis*, 384 So.2d 396 (La. 1980); *State v. Perkins*, 423 So.2d 1103 (La. 1982); *State v. Evans*, 463 So.2d 673 (La. 1985); *State v. Dozier*, 553 So.2d 931 (La. Ct. App. 1989); *State v. Knapper*, 579 So.2d 956 (La. 1991); *State v. Oliver*, 94-1642, p. 30-34 (La. App. 4 Cir. 1996) ("[a] prosecutor should not fail to make timely disclosure, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.") (*citing ABA Standards for Criminal Justice*, Prosecution Function and Defense Function, 3-3.11 (3d ed. 1993)); *State v. Ates*, 418 So.2d 1326, 1329 (La. 1982); *State v. Peters*, 406 So.2d 189 (La. 1981); *State v. Davenport*, 399 So.2d 201, 204 (La. 1981); *State v. Dawson*, 490 So.2d 560, 563 (La. App. 4th Cir. 1986); *State v. Felton*, 522 So.2d 626, 627 (La. App. 4th Cir. 1988); *State v. Rosiere*, 488 So.2d 965, 969-71 (La. 1986) (failure to turn over statements of witnesses inconsistent with the prosecution case); *State v. Carney*, 334 So.2d 415, 418-19 (La. 1976); see also *Monroe v. Butler*, 485 U.S. 1024 (1988) (Brennan, J., dissenting from denial of writ of *certiorari* in capital case); *Monroe v. Blackburn*, 476 U.S. 1145 (1986) (same); *State v. Walter*, 514 So.2d 620 (La. App. 4th Cir. 1987) (reversing where possible *Brady* evidence not produced until day of trial).

[7] In *Kyles v. Whitley*, 514 U.S. 419 (1995), this Court ordered Mr. Kyles' conviction be set aside because of the extent of the *Brady* violations by the Orleans Parish District Attorney's Office. The State failed to disclose evidence favorable to Mr. Kyles that included: (1) conflicting eyewitness statements taken by the police following the murder, (2) statements made by a police informant who never testified at trial, and (3) a list of license plates of potential suspects that did not list the license plate number of Mr. Kyles' car.

Not only does the Orleans Parish District Attorney's Office have a history of violating *Brady*, but in particular, Roger Jordan, the prosecutor in Mr. Smith's trial, has personally violated *Brady* on a number of occasions. In fact, Jordan was sanctioned by the Louisiana Office of Disciplinary Counsel (ODC) for his failure to produce material exculpatory evidence to the defense in the State's first-degree murder case against Shareef Cousin. *In re: Roger W. Jordan, Jr.*, No. 04-2397 (La. 06/29/2005); 913 So.2d 775. In that case, the Louisiana Supreme Court agreed with the ODC, who found that Jordan violated *Brady*, as well as Rule 3.8(d) of the Louisiana Rules of Professional Conduct by failing to disclose a March 5, 1995 eyewitness statement that "was clearly exculpatory." *Id.* at 782. Jordan withheld a police statement from the State's only testifying eyewitness, in which the eyewitness noted that because she did not have her glasses or contacts at the time she saw the alleged perpetrator, she had difficulty seeing the suspect. *Id.* at 777. As a result of Jordan's *Brady* violation, he was sanctioned with a three-month suspension from the practice of law. *Id.*

Less than a year later, Roger Jordan was found to have violated *Brady* yet again, this time in the Corey Miller case. *State v. Corey Miller*, 05-1111 (La. 03/10/2006); 923 So.2d 625. There were numerous *Brady* violations in the Corey Miller case, including the State's failure to disclose a "clearly exculpatory" eyewitness statement in which an eyewitness specifically stated to police that she had witnessed the murder, and told police Mr. Miller had not been involved. Mr. Jordan also suppressed another exculpatory eyewitness statement, as well as the accurate criminal history of two of its key witnesses against Mr. Miller. Because Roger Jordan's failure to comply with *Brady* undermined confidence in the verdict, the Louisiana Supreme Court reinstated the district court's ruling granting Mr. Miller a new trial. *Id.*

In the instant case, much like the Corey Miller and Shareef Cousin cases, prosecutor Roger Jordan concealed important eyewitness statements that were clearly exculpatory. In Mr. Smith's case, the State failed to disclose information that the testimony of its only eyewitness, Larry Boatner, was false and riddled with inconsistencies. The State also concealed police interviews of several other eyewitnesses stating that all of the gunmen wore masks, evidence that was inconsistent with Larry Boatner's eyewitness identification and subsequent trial testimony. In addition, the prosecution allowed several other witnesses to testify falsely.

B. The Trial

The State tried Mr. Smith for the instant case before the Morrison Road capital case. On December 2-5, and December 7, 1995, Juan Smith was tried in front of a jury for the Roman Street murders.

At trial, Reba Espadron testified that she had never seen Juan Smith before and that throughout the shooting the only man she had seen had his face covered, wore a hat to cover his hair, and only revealed his eyes. R. 96. She stated that this gunman was holding a "big handgun." R. 96.

Detective John Ronquillo testified that on June 28, 1995, at around 2:55 p.m., he showed Larry Boatner a photographic lineup at Charity Hospital. R. 99. According to Ronquillo, he met with Boatner for about fifteen minutes. Ronquillo stated he did not force or coerce Boatner to make the identification. Ronquillo testified that he showed Boatner the photographs and Boatner reportedly immediately picked out Juan Smith's photograph. R. 100.

On cross-examination, Detective Ronquillo agreed that Boatner was the only eyewitness to have identified Juan Smith. R. 109. Ronquillo stated that Boatner was supposed to meet with him at Reba Espadron's home on June 3, 1995 to view the line-up, but that Boatner didn't show

up. Ronquillo denied that Boatner ever told him that friends had given him information about who might have committed the shootings. R. 111. Ronquillo testified that Boatner told him on June 28, 1995, that he had seen Juan Smith's photograph in the newspaper. Ronquillo believed it was the June 4th Times Picayune. R. 112.

Larry Boatner was the only witness who could testify that Juan Smith was one of the armed men responsible for the killings at Roman Street. During the trial, Boatner testified that he was at the house on March 1, 1995. According to Boatner, Juan Smith was the first man to enter the home, and Boatner was positive that Mr. Smith was not wearing a mask. R. 154. Boatner testified that Juan Smith was face-to-face with him while Mr. Smith held a gun to Boatner's head. He stated that he definitely saw Juan Smith's face. R. 155. Boatner stated that Mr. Smith ordered him to get on the floor. When asked about one of the other men who had a AK-47, Boatner did not know whether that other man was wearing a mask or not. R. 156.

Boatner said he checked himself into Charity Hospital to stop drinking on June 26, 1995. While at Charity Hospital, Boatner met with Detective John Ronquillo and one of the nursing staff members. R. 171. Boatner claimed that Detective Ronquillo showed him a line-up and that he immediately picked Juan Smith, claiming "I'll never forget Juan's face, never." R. 172. In the courtroom, Boatner then identified Juan Smith as the man who put a .9mm to his head, stating, "like I say, I'll never forget him." R. 173. Boatner also stated that the armed gunman had a mouth full of gold.

On cross-examination, Boatner stated that he had told the police on March 1st "how his hair was and I told him about the golds in his mouth." He also recalled that the gunman was heavy set. Boatner admitted that in the photographic line-up he could not see any gold in Mr. Smith's teeth. R. 178.

The defense called one witness to testify that Larry Boatner suffered from acute alcohol abuse at the time he identified Mr. Smith. R. 220-221.

After the close of evidence the jury found Juan Smith guilty as charged to each of the five counts of first-degree murder.

C. Post-Conviction Evidentiary Hearings

Evidentiary hearings on Petitioner's *Brady, Napue* and *Giglio* claims were held January 13, 14 and 22, and February 2, 2009 at the order of the Orleans Parish criminal district court. Petitioner called six witnesses, including defense trial counsel, Frank Larre, Barbara Riley, former head nurse at the Rehab Institute of New Orleans, Detective John Ronquillo, Eric Rogers, and Janie Mills, a former Psychiatric Technician at Charity Hospital. The State called four witnesses, including Reba Espadron's neighbor, Dale Mims, Larry Boatner and Sergeant Archie Kaufman. At the hearing, Petitioner introduced exhibits P-1, P-2, P-3, P-4, and P-5.

Frank Larre, Mr. Smith's trial lawyer, was shown Petitioner's Exhibit 1 (in globo documents obtained from the District Attorney's file in Mr. Smith's case) as well as Petitioner's Exhibit 2 (in globo documents obtained from the New Orleans Police Department). Mr. Larre testified that he was not provided these documents prior to or at any time during the trial. 1/13/09 P.C. Hearing at 9-98.

a. Eyewitnesses Dale Mims and Shelita Russell

Mr. Larre testified he was never given a police interview of eyewitness Dale Mims in which Mims stated that on the night of the offense he heard multiple shotgun blasts and then saw four black males wearing masks and carrying rifles drive away in a white four-door Buick Oldsmobile car. Mr. Larre stated that he could have used this interview to impeach Larry

Boatner's testimony that the men were not wearing masks and that he was hit with a handgun. 1/13/09 P.C. Hearing at 10-11.

On January 13, 2009, the State called Dale Mims as a witness. Mr. Mims testified that immediately after hearing gunfire he saw two men run out of Reba Espadron's home and get into a four-door white car. 1/13/09 P.C. Hearing at 103. The car then passed in front of Mr. Mims' house and he saw three men inside it. *Id.* at 112. He further testified that at least two or maybe all three men were wearing masks when they exited the home. *id.* at 102-103.

On cross examination Mr. Mims gave further details of what he recalled—that he saw two men outside and when they passed his house there were three men:

> Q. There were three?
>
> A. Yes. Like I said, the AKA'S stopped shooting. I saw the two guys, one on either side with the guns get in the car. Then I heard the twelve gauge going off in the background. *Id.* at 111.

The defense called Detective Ronquillo to testify regarding his interview with Dale Mims shortly after the shooting. According to Ronquillo, Mims told him all of the men were wearing ski masks and carrying rifles. He couldn't see any of the men's faces. 1/22/09 P.C. Hearing at 71-72.

Defense counsel also testified he was never given a police interview of another eyewitnesses, Shelita Russell, who died later at the hospital. Ms. Russell told the police at the crime scene that she was in the kitchen and that the first gunmen who entered the house had a black cloth across his face. 1/13/09 P.C. Hearing at 11-12. Mr. Larre testified that he could have used Ms. Russell's statement to impeach Larry Boatner's testimony that Juan Smith was not wearing a mask after identifying him as the first person through the door. *Id.* at 14.

b. **Larry Boatner's Prior Inconsistent Statements to Police**

Mr. Frank Larre testified that the State never provided him with multiple statements Larry Boatner made to police, many of which contradict his testimony at trial. Specifically, the State never disclosed a statement made the night of the murders that he could not "supply a description of the perpetrators other than they were black males"; his next statement that he was "too scared to look at anybody"; and his pretrial statement that he could not identify any of the weapons other than to state they were an "AK type assault rifle, one Tech nine type handgun, and a silver colored handgun." 1/13/09 P.C. Hearing at 16-18.

Mr. Larre also testified as to how he would have used these undisclosed police interviews to support Mr. Smith's defense during his trial:

> Well, it would have totally contradicted what Mr. Boatner was testifying to under my cross examination. It certainly was a previous statement that is inconsistent to what he was saying in court. It would have been very, very exculpatory. *Id.* at 18.

c. **Circumstances Surrounding Boatner's Identification of Petitioner**

On January 13, 2009, Frank Larre testified that he was unaware that Larry Boatner was being harassed by an NOPD Detective into making identification in the Roman Street case, as indicated by notes in Boatner's Charity Hospital records. 1/13/09 P.C. Hearing at 27.

When Mr. Larre was questioned about how this information might have changed his actions at trial, he stated that he would have attempted to locate witnesses mentioned in the records, and, if unsuccessful, would have attempted to introduce the Charity Hospital records as "defense evidence showing that the police had reports indicating that there were claims of police harassment to identify the witness." *Id.* at 27-28.

Petitioner called Janie Mills as a witness on January 14, 2009. At the time Larry Boatner identified Mr. Smith, Ms. Mills was a Psychiatric Technician at Charity Hospital on the floor

which housed Mr. Boatner. 1/14/09 P.C. Hearing at 11. Ms. Mills reviewed Mr. Boatner's medical records and was able to identify the handwriting and signature of the individual who stated that Mr. Boatner was "being harassed by an NOPD Detective Steve Ruffilo to identify a suspected perpetrator or perpetrators that were allegedly involved in shooting incident last March." DA 2079; *see* 1/14/09 P.C. Hearing at 16. Ms. Mills identified the individual as social worker Anna Blossom. 1/14/09 P.C. Hearing at 16. She further testified that Ms. Blossom is now deceased. *Id.* at 17.

d. Additional Evidence that Larry Boatner Testified Falsely at Petitioner's Trial

At trial, Larry Boatner testified that he saw Juan Smith's photograph on June 7, 1995 on the front page of the Times-Picayune and recognized him as one of the assailants. That testimony bolstered his later identification of Mr. Smith from a photographic lineup.

Detective Ronquillo's notes and testimony showed that Mr. Boatner claimed to have seen Mr. Smith's photograph on June 4, 1995. 1/22/09 P.C. Hearing at 11. Ronquillo also confirmed that Reba Espadron told him on June 10, 1995, that when she last spoke to Mr. Boatner on June 4, 1995 he told her the same thing. In fact Mr. Smith's photograph did not appear in the newspaper until June 7, 1995, three days after Mr. Boatner claimed he saw it.

In the hearing, Mr. Boatner testified that he gave police a height and weight description of the man he alleged was Mr. Smith. 1/14/09 P.C. Hearing at 46-47. During the trial, however, Detective Ronquillo testified at the trial that he never gave a height or weight description he was focused on the gun. R. 115. Moreover, Detective Archie Kaufman agreed that Boatner never gave any description of height or weight. 1/22/09 P.C. Hearing at 11.

Amazingly, Mr. Boatner testified at the hearing that there may have been only two men in the house. "I don't know how many people was in there. But, I know at that time it was two, for sure, like I said. It was Juan and someone else." 1/14/09 P.C. Hearing at 37. In all of his police interviews and at trial he testified to and described three men.

e. The Confession of Robert Trackling

On January 13, 2009, Petitioner called Eric Rogers, a cellmate of Robert Trackling, to whom Trackling confessed about his participation in Roman Street. Rogers testified that after Trackling confessed to him, Rogers made a statement to Detective Byron Adams of the NOPD. 1/13/09 P.C. Hearing at 123-125. Rogers stated that before he gave his official, tape-recorded statement, he was informally interviewed by Detective Adams. *Id.* at 128-29. In this informal, unrecorded statement, Rogers testified that he told police "Trackling told me that him, Banister [sic], and McGee [sic] had committed the crime." *Id.* at 129. In fact, Rogers stated that Trackling never mentioned Juan Smith in his confession, nor did Trackling tell Rogers that Short Dog was Juan Smith. *Id.* at 139.

According to Rogers, after he gave police this initial statement, Detective Adams indicated that Juan Smith was involved in the Roman Street incident and asked Rogers to implicate Mr. Smith:

> [W]hen I talked to Byron Adams, he asked me about a Short Dog. Did I know a Short Dog? So, I told him no. So, he said, did I hear of a Juan Smith? So, I told him no. And, he said that this was one of the guys that was supposed to have been in a murder. So, he said that if I do him a favor he would go talk to some people and get my life sentence took back. So, he had asked me to involve Short Dog, Juan Smith. 1/13/09 P.C. Hearing at 125.

Rogers further testified that the first time he had heard the name Juan Smith or Short Dog was from Detective Adams, and that he did not know either Juan Smith or Short Dog. *Id.* at 130. Nevertheless, because Detective Adams offered Eric Rogers a reduced sentence in his own

offense, Rogers gave police a statement that implicated Short Dog in the Roman Street murders. *Id.* at 131-34. Rogers testified that he was never interviewed by Juan Smith's lawyer about his knowledge of the Roman Street incident. *Id.* at 139.

Frank Larre was called by Petitioner on January 13, 2009, and testified that the State had not informed him that Robert Trackling had confessed to Eric Rogers about his participation in Roman Street. 1/13/09 P.C. Hearing at 30. Mr. Larre further testified as to how he would have used Trackling's confession to further his defense of Mr. Smith:

> Well, I could use it to show that some people said there were four people, that there was a chaos going on and nobody really knew what happened, especially since we have witnesses that said that they had masks on their faces. And, obviously, since this guy has confessed, I would suggest that he would know who was in the car and who did the shooting, and he denies that it was Short Dog. 1/13/09 P.C. Hearing at 32.

Moreover, Mr. Larre "would have used it for impeachment in cross examination." *Id.* at 33.

f. Phillip Young's Improved Medical Condition

On January 13, 2009, Petitioner called Barbara Riley, the head nurse at the Rehab Institute of New Orleans at the time when Phillip Young was receiving treatment at that facility after the Roman Street incident. 1/13/09 P.C. Hearing at 117. Mrs. Riley remembered Phillip Young, and testified that Young "did not speak" but was able to communicate by shaking his head yes or no when asked questions. *Id.* at 117-18. When questioned by the State about whether Young suffered from amnesia, Ms. Riley responded, "No, I recollect aphasia, a lack of speech." *Id.* at 120-21.

Ms. Riley testified that she was present when a detective from the New Orleans Police Department arrived on the unit and the detective asked Ms. Riley to be present during his questioning of Phillip Young. *Id.* at 118. Ms. Riley was present for the entire length of the questioning, and witnessed the detective administer the Miranda rights to Mr. Young. *Id.*

According to Ms. Riley, Mr. Young communicated that he understood his rights and could answer the detective's questions. *Id.* The questioning lasted about ten or fifteen minutes. *Id.* at 118-19.

On January 22, 2009, Petitioner called Detective John Ronquillo, who verified that he interviewed Phillip Young at the Rehab Institute of New Orleans. 1/22/09 P.C. Hearing at 47-48. Petitioner presented handwritten notes to Detective Ronquillo, which Ronquillo confirmed he had written during the course of the interview. *Id.* at 48. Detective Ronquillo testified as follows:

> Q. Now, in your notes your [sic] indicate that he shook his head. You have no, that didn't shoot me; and no—and then it has a paragraph that has Short Dog/Buckle (written phonetically)/Fats (written phonetically)?
>
> A. Right.
>
> Q. And, then next to it, it says, "No didn't shoot me." And underneath that it says, "No, not with me when went to house."
>
> A. Right. *Id.* at 49.
>
> Q. And then on the next question, it is got a yes on that he—that one of the people in the house shot him, is that correct?
>
> A. That's what it says. *Id.* at 50.[8]

Mr. Larre testified that he was never provided with Detective Ronquillo's notes regarding his interview with Phillip Young during which Young indicated that Short Dog was not responsible and did not go to the house on the night of the offense. 1/13/09 P.C. Hearing at 29. Mr. Larre then described that he would have used this information as indicating that an admitted

[8] Mr. Young's answer that one of the people inside Roman Street shot him is accurate. At Mr. Smith's trial, the State introduced the .25 gun that Robert Simon has been armed with that day. R. 91. Reba Espadron also testified that Robert Simon was armed with a .25 pistol the day of the incident. R. 75. Moreover, NOPD recovered .25 casings from the scene of the crime. R. 132-33.

participant in the offense "[d]enies that Short Dog, who was alleged to have been my client, participated in the robbery and murder and did not shoot him." *Id.* at 29.

In the instant case, the sum of the *Brady* and *Napue/Giglio* violations completely changes the lens through which the State's case against Mr. Smith can be viewed. In light of the *Brady* evidence, Larry Boatner's testimony, which provided the only evidence linking Mr. Smith to the murders, is untrustworthy and unreliable. Not only is Boatner's testimony refuted by his own undisclosed previous statements to police, but it is also impeached by other undisclosed eyewitness statements. Further, the suppressed evidence establishes that Phillip Young, an alleged perpetrator in the offense, asserted that Petitioner was *not* involved in the offense. In withholding this information from defense counsel, the State prevented the defense from subjecting its case against Mr. Smith to any meaningful adversarial treatment. Because the suppressed evidence was material and prevented the jury from fully evaluating the integrity of the state's case, Mr. Smith's conviction is unreliable and should be reversed.

II. The Louisiana State Courts Ignored Fundamental Principles of Due Process in Rejecting Smith's *Brady* and *Napue/Giglio* Claims

In the thirty years after *Mooney v. Holohan*, 294 U.S. 103 (1935) *(per curiam)*, this Court identified an important class of due process rights now commonly referred to as the *Brady* doctrine. This series of cases has uniformly condemned the prosecution's presentation of evidence that is false, that is known to create a false impression, as well as the suppression of evidence that is favorable or exculpatory to the defense.

In *Napue v. Illinois*, 360 U.S. 264 (1959), this Court held that there is no difference between false evidence offered by the state and false evidence that goes "uncorrected when it

appears," 360 U.S. at 268; *see also Giglio v. United States*, 405 U.S. 150 (1972) (government required to disclose evidence of the deal with its witness when his credibility is material to guilt). The landmark case of *Brady v. Maryland*, 373 U.S. 83 (1963) noted the prosecution's obligation to disclose any evidence in its possession that is favorable to the defense or that may "tend to exculpate [the defendant] or reduce the penalty."

Id. at 88.

The truth-seeking policy underlying the *Brady* doctrine mandates that it encompass two situations: the prosecution's offering of evidence that it knew or should have known to be false and the prosecution's suppression of evidence favorable to the defense. Because each type of prosecutorial misconduct perverts and "corrupt[s] . . . the truth-seeking function of the trial process," *United States v. Agurs*, 427 U.S. 97, 104 (1976), this Court has uniformly and adamantly denounced both.

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court emphasized that the prosecution's duty to disclose favorable evidence under *Brady* "turns on the cumulative effect of all such evidence suppressed by the government" and that "the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." *Id.* at 421; *see also Banks v. Dretke*, 540 U.S. 668 (2004).

The Louisiana state courts have abdicated their responsibility in failing to address the due process violations present in Petitioner's case. After Petitioner's state post-conviction petition was filed, four days of evidentiary hearings were held at the order of the trial court judge. During the evidentiary hearings, Petitioner was able to present for the first time certain favorable evidence that the prosecution never disclosed either before or during trial. Despite this, the trial court orally issued its ruling denying relief at the close of the fourth day:

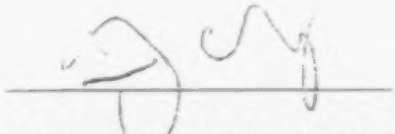
BY THE COURT: I am ready to rule in the case. I don't have to take any time for this. I have been listening to this for quite a while. I am denying post-conviction relief. 2/02/09 P.C. Hearing at 18.

The Fourth Circuit Court of Appeal and the Louisiana Supreme Court both declined to review Petitioner's claims. All three state courts denied Petitioner relief without making any factual findings or providing any reasons for their ruling. As a result, the suppressed evidence that Petitioner presented has never received meaningful consideration by the Louisiana state courts.

CONCLUSION

Wherefore, for the foregoing reasons, Mr. Smith respectfully moves the Court to grant review of this matter and reverse Mr. Smith's conviction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Writ Certiorari upon counsel for opposing party, by depositing a copy of same by means of U.S. Mail, and sending it to the following address:

Donna Andrieu, Assistant District Attorney
Orleans Parish District Attorney's Office
619 S. White Street
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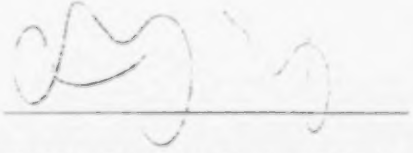
This 13 day of December, 2010.



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OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAR 2 1 2011
OFFICE OF THE CLERK

No. 10-8145

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN SMITH,
Petitioner,

V.

BURL CAIN, Warden, Louisiana State Penitentiary,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of Louisiana

BRIEF FOR RESPONDENT IN OPPOSITION

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ISSUES PRESENTED

1. Did the courts of Louisiana act inconsistently with the usual course of judicial proceedings in summarily denying the petitioner's applications?

2. Would the information not disclosed by the State have given rise to a reasonable probability that the outcome of the petitioner's trial would have been different?

3. Did the non-disclosure by the State amount to subornation of perjury?

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STATEMENT

The Petitioner seeks to overturn convictions of five counts of first degree murder based on allegations that the state courts disregarded this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), when they denied his application for state post conviction relief. He points to particular incidences of purported evidence suppression as the factual basis for his claims, the aggregation of which he suggests warrants the vacating of his convictions. He bolsters this suggestion with a proposition that any conviction out of the Orleans Parish District Attorney's Office mandates reversal, particularly if a specific assistant district attorney formerly employed with the office tried the case. However, the Petitioner's suggestions are unsubstantiated, and the mere aggregation of individually meritless suggestions cannot prove, as the Petitioner claims, a cognizable violation of *Brady*, *Napue*, or *Giglio*.

The Petitioner argues that this Court should grant his Petition for a Writ of Certiorari because the state courts summarily denied his applications for relief. However, the state district judge, who presided over the Petitioner's trial, heard from ten witnesses over a four day post-conviction hearing and found, as a matter of law, that the Petitioner failed to meet his burden of proving that his convictions were obtained in violation of the Constitution of the United States. Further, although the Petitioner claims that the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court "declined to review [his] claims" (Pet. At 23.), in fact, those courts did review, and summarily denied, his applications for supervisory review, which were appended with copies of the relevant transcripts and exhibits. Considering the unmeritorious nature of

the Petitioner's claims, the decisions of the state courts are reasonable applications of decisions of this Court and consistent with the usual course of judicial proceedings. As such, the instant petition should be denied.

I. FACTUAL BACKGROUND

The facts at issue in the instant application were summed up by the Louisiana Fourth Circuit Court of Appeal in its opinion affirming the petitioner's convictions and sentences:[1]

> On March 1, 1995, Rebe Espadron, her sister, Shelita Russell, and cousin, Robert Simon, were at their home on N. Roman Street, awaiting the arrival of several friends. At approximately 6:00 p.m., Ian Jackson, James Jackson, William Leggett, Larry Boatner and Reginald Harbor arrived at the Espadron house to play cards. Ms. Espadron and Reginald Harbor retired to her bedroom to watch television; the others remained in the kitchen. Shortly after 7:00 p.m., Larry Boatner heard a car stop in front of the house. As he opened the front door and looked out, Juan Smith, Phillip Young and another armed man entered the house demanding drugs and money. Smith ordered Ms. Russell, Robert, Ian, James, William, and Larry to lie on the kitchen floor, and to surrender their money. A short while later, Ms. Espadron went to the kitchen door to investigate the noise. As she opened the door, a man wearing a hat and a bandana over his mouth and nose pointed a gun in her face, and ordered her to lie on the floor. Ms. Espadron ran back into her bedroom and as she did, shooting erupted in the kitchen. She and Harbor cowered in the bedroom. When the gunfire stopped, Harbor made his way into the kitchen/living room area where he found five bodies on the floor. Ms. Espadron ran outside, and flagged down passing police officers. As she re-entered the house, she found Robert Simon's body lying on top of Phillip Young in the living room, and Shelita Russell, James Jackson and William Leggett on the floor in the kitchen.
>
> Officers Joseph Narcisse and Errol Lavasseur were dispatched to Ms. Espadron's residence to investigate a complaint of gunfire and aggravated burglary. As the officers entered, they found three victims in a pool of blood in the kitchen and two others in the adjoining living room. Shelita Russell, one of the victims found in the kitchen, was conscious but unable to provide any information on the incident. The other two victims in the kitchen, James Jackson and William Leggett, exhibited no signs of life. Phillip Young, one of the assailants, who was conscious but unable to

[1] *See State v. Smith*, 2000-KA-1392 (La. App. 4 Cir. 7/18/01), 797 So.2d 193 (Table).

move, was lying face down in the living room with Robert Simon lying partially on top of him. When emergency medical personnel arrived, they rolled Robert Simon's body off of Phillip Young, who was clutching a .25 caliber pistol in his left hand. The EMS personnel pried the loaded and cocked weapon from Young's grip. As the officers secured the premises, they found Larry Boatner in the bathroom. He had not been shot but was suffering from a severe head laceration. Officers Narcisse and Lavasseur discovered the body of Ian Jackson in the alley.

Homicide Detective John Ronquillo found numerous 9-millimeter and AK-47 shell casings at the scene and bullet riddled living room and kitchen floors, walls and windows. He directed the crime scene technicians to photograph and dust the area for fingerprints. Officers discovered a pager on Phillip Young, and retrieved the telephone numbers stored in the unit. One of the numbers was registered to Kintad Phillips at his 2046 Rousseau Street residence. Detective Ronquillo presented a photographic lineup to Larry Boatner from which Boatner identified Juan Smith as one of the assailants.

Detective Kenneth Leary, the State's expert firearms examiner, tested the .25 caliber weapon seized from Phillip Young, and determined that the gun fired three bullet casings retrieved at the scene. He also identified 9-millimeter and AK-47 semi-automatic rifle ammunition fired at the scene.

Drs. William Newman and Alvaro Hunt, experts in autopsy pathology, performed autopsies on the five victims. All of the victims died from multiple gunshot wounds delivered execution style as they lay face down on the floor. Blood toxicological tests on Shelita Russell and James Jackson were negative for alcohol and commonly abused drugs. However, the other victims' blood exhibited the presence of cannabinoids and excessive levels of alcohol. Dr. Newman opined that Ian Jackson's leg wounds suggested he attempted to flee the attackers, which would explain his body being found in the alley, rather than in the house. The doctors retrieved bullets and bullet fragments from the victims' bodies during the autopsies.

II. PROCEEDINGS BELOW

The petitioner and his co-defendant, Phillip Young, were indicted on August 31, 1995, for five counts of first-degree murder, a capital violation of Louisiana Revised Statute (La. R.S.) 14:30, relating to the March 1, 1995 shooting deaths of Shelita Russell, Willie Legget, Ian Jackson, James Jackson, and Robert Simons (the North Roman Street

murders). In the same indictment, the petitioner, along with Donielle Bannister, Kintad Phillips, and Robert Trackling, was charged with three counts of first-degree murder relating to the February 5, 1995 shooting deaths of Tangie Thompson, Devyn Thompson, and Andre White (the Morrison Road murders). At his September 11, 1995, arraignment the petitioner pleaded not guilty to all eight counts. He was tried in December of 1995 for the North Roman Street murders, and the jury returned verdicts of guilty as charged on all counts. The same jury subsequently recommended that the Petitioner be spared the death penalty and, in accordance with that recommendation, the trial court sentenced the Petitioner, on each count, to imprisonment for life, at hard labor, in the custody of the Louisiana Department of Corrections, without benefit of parole, probation, or suspension of sentence, with the sentences to run concurrently with one another. It is from these convictions that the instant petition arises.

The Petitioner's convictions were affirmed by the Louisiana Fourth Circuit Court of Appeal, and his writs for supervisory review in the Louisiana Supreme Court were denied. The Petitioner thereafter sought a writ of certiorari from this Court, which was denied on February 24, 2003.

The petitioner filed a *pro se* post-conviction relief application in the state district court. Thereafter, counsel appointed to represent the Petitioner filed a supplemental post-conviction relief application, which expanded upon his *pro se* claim that prosecutors had withheld favorable evidence relating to the North Roman Street murders, including eyewitness misidentification of him as the perpetrator; Phillip Young's involvement in the murders; Robert Trackling's confession to, and implication of Donielle Bannister in, the murders; and the existence of numerous other known suspects in the murders.

Counsel also amended the Petitioner's ineffective assistance claims and added claims that prosecutors had knowingly presented false testimony during the guilt phase of trial and had unfairly denied him the ability to secure Phillip Young's testimony.[2]

The State District Court conducted an evidentiary hearing on the petitioner's post-conviction claims over four days in January and February 2009, during which it heard testimony from victim and police witnesses as well as the Petitioner's trial counsel. On February 2, 2009, the State District Court orally denied post-conviction relief without giving reasons. The Petitioner, through counsel, filed a supervisory writ application in the Louisiana Fourth Circuit, which was summarily denied. Again through counsel, he timely sought supervisory review in the Louisiana Supreme Court, which summarily denied relief on September 24, 2010. The instant petition followed.

REASONS FOR DENYING THE PETITION

The Petitioner claims that this Court should grant his Petition for a Writ of Certiorari because (1) the state courts summarily denied his applications for relief, which, petitioner appears to contend, is inconsistent with the usual course of judicial proceedings; (2) the State withheld material information in violation of this Court's holding in *Brady v. Maryland*; and (3) prosecutors knowingly permitted Larry Boatner to testify falsely at trial, in violation of his due process rights.

I. The state courts' determinations were a result of accepted and usual course of judicial proceedings.

Petitioner is aggrieved because the state district judge "orally denied relief. . . without issuing a written opinion, making any factual findings, or providing any reasons for [his]

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[2] Counsel also included a claim that Petitioner's sentence of death upon conviction for the Morrison Road murders in a separate proceeding was obtained through use of an invalid prior conviction—to wit, the conviction for the North Roman Street murders.

ruling." (Pet. at 4.) However, the state district judge, who presided over the Petitioner's trial, heard from ten witnesses over a four-day post-conviction hearing and found, as a matter of law, that the Petitioner failed to meet his burden of proving that his convictions were obtained in violation of the Constitution of the United States. Further, although the Petitioner claims that the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court "declined to review [his] claims" (Pet. At 23.), in fact, those courts did review, and summarily denied, his applications for supervisory review, which were appended with copies of the relevant transcripts and exhibits.

The rules of the Supreme Court of Louisiana and the Louisiana Courts of Appeal provide that a grant or denial of an application for writs at the higher state courts rests within the judicial discretion of the courts, which may act peremptorily on an application. *See*, Supreme Court of Louisiana, Rule X(1)(A); Rule 4-7, Louisiana Uniform Rules of the Court of Appeal. This Court has recently noted, in the context of federal *habeas* petitioners, that every federal Court of Appeals has recognized that "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Harrington v. Richter*, 562 U.S. —, 131 S. Ct. 770 (2011). Accordingly, the summary denial of the Petitioner's state court applications cannot be said to be inconsistent with the usual course of judicial proceedings.

II. The Petitioner's state post conviction application was properly denied because the Petitioner failed to meet his burden of proving that his conviction was obtained in violation of *Brady v. Maryland* and its progeny.

The Petitioner's claims that the State withheld evidence seem to fall into three categories: (1) the withholding of evidence regarding eyewitness identification; (2) the withholding of evidence of Phillip Young's improved medical condition; and (3) the

withholding of evidence regarding Robert Trackling's involvement in the murders. Initially, the Petitioner fails to demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667 (1985) (White, J., concurring). Further, viewing the undisclosed evidence collectively, the Petitioner cannot prove a *Brady* violation by the mere aggregation of individually meritless claims.

To prevail on a *Brady* claim, a petitioner must show that (1) the prosecution suppressed or withheld evidence that was (2) favorable to the accused and (3) material to either guilt or punishment; and although the *Brady* doctrine mandates disclosure of certain evidence, it does not require the prosecution to open its files to the defense. However, the mere possibility that undisclosed information might have helped the defense or affected the outcome does not establish the materiality of that information. *United States v. Agurs*, 427 U.S. 97 (1976). Rather, undisclosed information is material only where the nondisclosure deprives the defendant of a fair trial. *Id.* As this Court has stated, "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. at 682; *id.* at 685 (White, J., concurring). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *Bagley*, 473 U.S. at 682.

A. Withholding of Evidence Regarding Eyewitness Identifications

i. Evidence Allegedly Undermining the Credibility of Larry Boatner

The Petitioner claims that prosecutors withheld favorable evidence that, if disclosed before trial, could have been used to undermine the credibility and reliability of

Larry Boatner's photographic and in court identifications of the petitioner as the shooter. In support of this claim, the Petitioner points to seven discrepancies between Boatner's trial testimony and undisclosed statements he and others gave to police and hospital staff:

(1) Boatner's statement to Detective Ronquillo on the night of the incident that he could not supply a description of the shooters except to say that they were black males, allegedly contradicting his trial testimony that he noticed the petitioner's mouth full of gold teeth after the petitioner and the other gunmen burst into the North Roman Street residence;

(2) Boatner's statement to Detective Ronquillo that he had been too scared to look at anyone during the incident, allegedly contradicting his trial testimony that he had been trying to see who the shooter was;

(3) Boatner's pre-trial statement that he could not identify any of the weapons used other than that they included an AK-type assault rifle, a Tech Nine-type handgun, and a silver colored handgun, allegedly contradicting his trial testimony that the petitioner carried a .9mm handgun, which was identified by police as the murder weapon;

(4) Charity Hospital records documenting Boatner's complaint that he was being harassed by a detective to make an identification of the North Roman Street perpetrator(s), which allegedly indicated the coercive nature of Boatner's ultimate identification of the petitioner and the fact that Detective Ronquillo had likely visited Boatner in the hospital prior to the date he made the identification;

(5) Unidentified records allegedly demonstrating that Boatner knew that police had already identified the petitioner as a perpetrator of the North Roman Street

murders, which implied that his ultimate identification of the petitioner had been unduly suggestive;

(6) Victim Shelita Russell's pre-death statement that the first gunman who entered the house (identified by Boatner as the petitioner) wore a mask, allegedly contradicting Boatner's statement that he saw the face of and could accurately identify his assailant; and

(7) Statements by Reba Espadron and neighbor Dale Mims to investigators, documented in police and newspaper reports, that four masked gunmen invaded the North Roman Street residence, allegedly contradicting Boatner's testimony that the petitioner was unmasked at the time.

Aside from merely recording the above contentions and highlighting his trial counsel's post-conviction testimony that he was not provided with any of the information in question, the Petitioner makes no attempt to argue the materiality of the complained-of discrepancies or to articulate specifically how the State's disclosure of the withheld documents would have created a reasonable probability of a different verdict. Instead, the petitioner merely notes that Boatner was the only eyewitness to the crime and conclusorily presumes that Boatner's trial testimony would somehow have been "impeached" and "refuted" had the jury been presented with such discrepancies, leaving entirely to the imagination the form that such impeachment and refutation would take. Nevertheless, a review of the petitioner's contentions, when measured against the facts of the case, exposes the fatal flaws present in argument that would might tend to support them.

a. **Boatner's statement to Detective Ronquillo on the night of the incident that he could not supply a description of the shooters**

First, the Petitioner contends that Larry Boatner provided a statement to Detective Archie Kauffman that indicated that Boatner could not describe any of the perpetrators. Subsequently, however, Boatner gave a statement to Detective Kaufman, contained in a supplemental police report, indicating, contrary to the Petitioner's representation, that Boatner "could not describe any of the subjects, *other than the subject who put the gun in his face*," who had "golds in his mouth," and whom he in fact later identified as the Petitioner.

The non-disclosure of this first statement, petitioner alleges, rises to the level of a *Brady* violation. However while testifying during the post-conviction hearing, Detective Ronquillo stated that, while Boatner had initially told him that he could not describe any of the perpetrators except that they were black males, Boatner later gave a formal recorded statement in which he told Detective Kaufman: "I can tell you about one [of the subjects], the one who put the pistol in my face." Although Boatner emphasized that he could only describe that one subject, he noted that the subject had gold teeth. Boatner's description very closely matched that of the Petitioner. Ronquillo attributed Boatner's initial reluctance to provide a description to his being "shook up" after the incident, especially as "at that point . . . he was in the home and there were dead bodies everywhere," as well as to "his not wanting to be involved in this case anymore." Ronquillo noted, however, the accurate description of the Petitioner Boatner had earlier provided. Accordingly, the State's disclosure of Detective Ronquillo's supplemental report would not have served to impeach the credibility of Larry Boatner's identification

in that regard.

b. Boatner's statement to Detective Ronquillo that he had been too scared to look at anyone during the incident

Second, the Petitioner represents to this Court that Boatner initially told Detective Kaufman that he had been too scared to look at anybody during the incident. Contrary to the petitioner's mistaken reading of Boatner's statement to Kaufman, Boatner clearly indicated that he was too scared to look at anybody *after he and the other victims had been ordered to the floor*, which does not conflict with his statement and testimony that he was able to see and describe the petitioner prior to that moment. Moreover, Boatner indicated that he was too scared to look at any of the perpetrators *other than* the petitioner, whom he encountered unexpectedly after opening the front door and whose face he therefore could not help seeing. These statements are entirely consistent with Boatner's post-conviction testimony, in which he explained that he closed his eyes after being ordered to the floor by the petitioner, and that he did not open them "until the gunshots." Therefore, because Boatner's statements and testimony were consistent, non-disclosure of the statements did not violate *Brady*.

c. Boatner's pre-trial statement that he could not identify any of the weapons used

Third, the Petitioner's argument regarding Boatner's description of the weapons used during the crime also bears no fruit. Boatner consistently described the petitioner as carrying a handgun. In fact, at trial Boatner testified, consistent with his police statement, that the .9 mm gun the petitioner carried was "a silver gun." When asked whether it was a handgun, Boatner replied affirmatively. He confirmed that fact on cross-examination at the post-conviction hearing, stating that the gun in the petitioner's

hand was "a nine millimeter chrome."

d. Charity Hospital records documenting Boatner's complaint that he was being harassed by a detective

Fourth, the Petitioner alleges that Boatner's undisclosed Charity Hospital records show that his photographic identification of the Petitioner as a perpetrator was the product of "harassment" by Detective Ronquillo earlier that morning, and thus was unduly suggestive and/or unreliable. However, he provides no factual or legal support for his unwarranted inferential leap that any possible harassment by Detective Ronquillo in some way rendered Boatner's identification of the petitioner unduly suggestive or otherwise affected its reliability. He does not so much as specify the nature of the supposed harassment as it pertained to Boatner's eventual identification.

At the pre-trial hearing on a motion to suppress Boatner's identification, Boatner himself testified that Detective Ronquillo neither forced nor coerced him to make an identification, nor promised him anything in exchange for his identification, nor suggested that he select the petitioner. Hearing that testimony, the trial judge denied the motion to suppress. Subsequently, at the post-conviction hearing, Boatner reiterated that testimony and reaffirmed that he was not visited by detectives prior to the date on which he made his identification. Janie Mills, the psychiatric aid who tended to Boatner during his stay at Charity, also testified at the pre-trial motion hearing, as a defense witness, that Detective Ronquillo did not suggest to Boatner whom he should select from the photographic arrays. She further testified at the post-conviction hearing that Boatner did not appear to be distressed while talking to detectives during his identification. Detective Ronquillo testified at the post-conviction hearing that he had no recollection of visiting Boatner in the hospital prior to the date and time he made his identification of the

petitioner.

e. **Unidentified records allegedly demonstrating that Boatner knew that police had already identified the petitioner as a perpetrator of the North Roman Street murders**

Fifth, the Petitioner alleges that, contrary to his testimony at trial, Boatner made statements to both Espadron and Detective Ronquillo that he observed a picture of the petitioner in *The Times-Picayune* on June 4, 1995, when in fact that picture did not appear in the paper until June 7, 1995. It is true that the picture did not appear until June 7, 1995. It is also true that Mr. Boatner testified accurately and truthfully at trial that he observed the picture in the paper on June 7, 1995. The significance, if any, of this discrepancy is unclear, and the petitioner makes no effort to illuminate it. To the extent it might have served to call into question the credibility of Boatner as a factual witness, it is to be remembered that, to a man who narrowly escaped a brutal assault that left five of his friends dead, a date would likely be an inconsequential detail in the face of once again being confronted with the image of the man who very nearly took his life. Nevertheless, it was for a jury to judge Boatner's total credibility, and nothing about his minor discrepancy as to dates would have undermined confidence in the outcome of the proceedings. Thus, the unidentified records allegedly memorializing this discrepancy were not subject to *Brady*.

f. **Shelita Russell's pre-death statement that the first gunman who entered the house (identified by Boatner as the petitioner) wore a mask**

Sixth, the Petitioner argues that information in a "daily" entry in Detective Ronquillo's supplemental police report noting Shelita Russell's purported pre-death statement that the first subject who entered the North Roman Street residence had a black

cloth across his face, would contradict Larry Boatner's trial and post-conviction testimony that the petitioner—who he maintains was the first perpetrator to enter—did not have his face covered. The notation in question reads, "Said—in kitchen saw people barge in—one—black color across face—first one through door—[No further statement]." The petitioner's trial counsel testified at the post-conviction hearing that had he been provided with Russell's statement he would have used it to "reinforce the fact that Mr. Boatner could not have identified anyone," thus undermining his identification of the petitioner. However, even if favorable, the petitioner fails to demonstrate the materiality of Russell's statement. Had the trial court admitted Russell's statement, the petitioner must still show a reasonable probability that its admission would have served to discredit Boatner's testimony regarding the petitioner's appearance to such an extent that confidence in the outcome would be undermined.

It is not enough, then, for the petitioner to show merely that the jury would have been confronted with competing accounts of whether the petitioner's face was covered when he entered the residence; he must show a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Agurs*, 427 U.S. 97, *supra*. Considering that Boatner's testimony was internally consistent and there was no conflicting physical evidence regarding the condition of the perpetrators' faces, the petitioner cannot show that the result of the proceeding would have been different. The jury could easily have taken into account that Boatnerwas in immediate proximity to the petitioner—unlike Russell, who was cowering in a room at the back of the house—when he entered the residence and that the face of co-perpetrator Phillip Young, who was left severely injured inside the house, was not

covered. Thus, the petitioner cannot demonstrate a reasonable probability that the admission of Shelita Russell's undisclosed statement would have resulted in the jury's discrediting Boatner's testimony.

g. Statements by Reba Espadron and neighbor Dale Mims to investigators

Seventh, the petitioner alleges that undisclosed police and newspaper reports show that Reba Espadron and neighbor Dale Mims gave statements to police that they observed four masked gunmen enter the North Roman Street residence, which contradicts Larry Boatner's testimony that three unmasked men perpetrated the crime.

Initially, it must be noted that prosecutors have no duty under *Brady* to disclose information contained in a newspaper article, as "[t]he government is not obligated to furnish a defendant with information he already has or can obtain with reasonable diligence." *United States* v. *Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (citing *United States* v. *Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977)). Information contained in a newspaper is readily available to any citizen through reasonable diligence, and thus the petitioner fails to make a showing that prosecutors possessed evidence subject to disclosure under *Brady*. *See Agurs*, 427 U.S. at 103.

Turning to the statement by neighbor Dale Mims, he told Detective Ronquillo that he heard shots and looked out his front door, whereupon he saw three black males armed with AK-47s exit 2230 North Roman (where the murders occurred), get into a white 4-door Buick and drive off. He then heard a shotgun blast and saw a fourth subject get into another vehicle and also leave the scene. Mims stated that all four men were wearing ski masks covering their faces. At the post-conviction evidentiary hearing, Mims testified similarly, but acknowledged that one of the three men he saw exiting the house did not

have a mask. He also admitted that he did not see the men in question arrive at or enter 2230 North Roman, nor did he see them inside the residence. He also recalled that the men wearing masks removed them after they entered the Buick.

Detective Ronquillo's notes indicate that Reba Espadron told Detective James Stewart that she observed only one of the perpetrators, whom she described as being 5' 6" tall and slim with a "thing around his face." At the petitioner's trial she testified accordingly and further described him as carrying a "big gun" that he held with two hands. Ronquillo testified at the post-conviction hearing that the physical description provided by Espadron did not match the petitioner. Moreover, the gun carried by the perpetrator who confronted Espadron (most likely the AK-47) was clearly not a handgun, as was carried by the petitioner.

Mims' and Espadron's undisclosed statements would not have served to impeach the trial testimony of Larry Boatner or his identification of the petitioner. Mims confirmed that he did not see the subjects he described at any time before or during their entrance into 2230 North Roman, and thus would not have been able to testify as to whether their faces were covered when Boatner first encountered them. He further stated that one of the men may not have been masked at all. Espadron described a subject that was clearly not the petitioner, who Boatner testified was the only perpetrator whose face he observed. Her statement thus does not undermine his identification. Therefore, the petitioner cannot show that the undisclosed statements of Dale Mims or Reba Espadron would have aided him at trial.

B. Evidence of Phillip Young's Improved Medical Condition

The petitioner claims that prosecutors withheld material evidence from the defense—namely Detective Ronquillo's supplemental report and "daily" notes indicating that he interviewed Phillip Young in Charity Hospital following the shooting—that would have demonstrated the petitioner's innocence and therefore cast the State's trial evidence in a different light. He further notes that the evidence regarding Young's improved medical condition and the statements made by him contradict Ronquillo's testimony and the prosecution's statement to the jury that Young was in a vegetative state and unable to communicate. These allegations are spurious.

First, the petitioner was well aware of Young's medical condition throughout the proceedings. Young was in fact a co-perpetrator of the North Roman Street murders and was charged in the same indictment as the petitioner. In fact, on October 19, 1995—barely a month after the petitioner was arraigned—the court ruled Young irrestorably incompetent, finding that he "will never be able to assist his counsel in trial due to perminent [*sic*] brain damage."

Second, Ronquillo's notes regarding Young's condition do not conflict with his trial testimony. In fact, in response to the prosecutor's very first question on the issue, Ronquillo confirmed that he had indeed spoken to Young at Charity Hospital. The prosecutor even admonished Ronquillo in his questioning, in light of the hearsay rule, not to "say what [Young] said if he said anything to you." This open court colloquy hardly evidences a prosecutorial conspiracy to conceal from the jury the fact that Young could in fact communicate. Moreover, Ronquillo's testimony that Young could not speak much and could only use his left hand did not conflict with his undisclosed notes; rather, his

notes corroborate that testimony almost word-for-word. Furthermore, Ronquillo's statement at trial that he couldn't understand anything that Young was saying did not refer to Young's inability to communicate at all, merely—when presented in the context of the colloquy as a whole—to his ability to communicate verbally, which inability is acknowledged even by the petitioner. The statement also reflects Ronquillo's own subjective impression of Young's communicative ability and, as such, is not an allegation of objective fact that could be empirically contradicted by the undisclosed report.

In any event, even if Young's "statements" had been disclosed and admissible at trial—despite their constituting hearsay—they would not have served to undermine confidence in the jury's verdict. Detective Ronquillo testified at the post-conviction hearing that he disavowed Young's statements because he was uncertain as to whether they even had any substance. As noted above, the jury would have been free to consider the fact, as prosecutors would no doubt have emphasized, that Young was a known associate and co-defendant of the petitioner, as well as the inherent bias that accompanied that relationship. This was corroborated by Ronquillo's post-conviction testimony that "the whole nature of [Young's] behavior and how he answered questions changed" when he found out Ronquillo was a homicide detective. Young could also reasonably fear that the petitioner—who had just murdered five people in cold blood—would not hesitate to do the same to him if he "snitched." Accordingly, Young had every incentive in the world to deny the petitioner's involvement in the killings or in his wounding, even if he could not deny his own presence on the scene. Therefore, the petitioner cannot show that there was a reasonable probability that confidence in the outcome would have been undermined.

Relatedly, Young had a corresponding incentive to blame his injuries on one of the occupants of the house. However, the jury would also have been free to consider that the .25 calibre handgun that the petitioner ascribes to Robert Simons was found by police clutched in Young's hand and would have been reasonable in finding it unlikely that Young had somehow managed to grab the gun from Simons after having essentially been rendered paralyzed and unconscious by the shot to his head. Even if established, however, the fact that Simons may have shot Young would not have served to exonerate the petitioner. Finally, the statements by Young that do not exculpate the petitioner—"drove in car", "girlfriend's car"—are of no real evidentiary value.

Finally, while the petitioner argues that the undisclosed evidence, even if not admissible itself, constitutes *Brady* material because it could have led to the discovery of admissible evidence favorable to the defense, *see, generally, Wood v. Bartholomew*, 516 U.S. 1(1995), he fails even to speculate what additional evidence could have been discovered to exculpate him based on the disclosure thereof. Detective Ronquillo was examined at length during the post-conviction hearing about numerous other leads and suspects in the North Roman Street murders and testified that through investigation he was able to eliminate everyone but the petitioner as a confirmed perpetrator. Confronted with that testimony at trial, the jury would have been reasonable in discrediting any "alternative suspect" theory that the disclosure of Young's hospital statements may have engendered.

The only evidence of how the defense would have used Young's statements was offered by the petitioner's trial counsel, who testified at the post-conviction hearing that he would have attempted to locate Young or, in the alternative, to introduce Ronquillo's

notes as evidence of police harassment of Young to make an identification. However, Young's whereabouts throughout the proceedings—especially after his remand to the state forensic facility—were hardly a secret and counsel could easily have visited and attempted to interview him with minimal diligence. Finally, as Young never identified any of the alleged actual perpetrators, any evidence as to police "harassment" to that end would have been entirely irrelevant.

The petitioner has utterly failed to demonstrate the materiality of the undisclosed notes regarding Phillip Young's improved medical condition and his "statements" to Detective Ronquillo.

C. **Evidence Regarding Robert Trackling's Involvement in the Murders**

The petitioner alleges that prosecutors withheld material evidence of Robert Trackling's confession to having participated in the North Roman Street murders and his implication of Donielle Bannister therein. In one of the undisclosed pieces of information, an inmate named Eric Rogers told police that Trackling had confessed to him that he committed the murders with Bannister and a man nicknamed "Short Dog," whom Rogers indicated was Robert Horne. Rogers testified at the post-conviction hearing that Trackling had told him the murders were committed by him, Bannister, and Romalice McGee, and that Detective Byron Adams had coaxed him to implicate the petitioner in exchange for reducing his life sentence for second-degree murder, even though he knew the petitioner had not been involved in the killings. He denied that he had ever spoken to the petitioner directly. The petitioner cites this as material evidence that directly exculpates him from the North Roman Street murders.

The second piece of undisclosed information involves a June 1, 1995, interview

between Detective Adams and Trackling relating to his involvement in the Morrison Road murders, during which Trackling identified the petitioner from a photographic lineup as "Short Dog" and implicated him in the Morrison Road murders. The petitioner notes with suspicion the timing of Adams' interview with Trackling—roughly two weeks after his interview with Rogers—and the fact that Trackling was not asked about his role in the North Roman Street murders, despite the information learned from Rogers. He further points to a notation entry in Detective Ronquillo's supplemental report stating that Adams had interviewed Trackling and that Trackling had denied being involved in the North Roman Street murders, which he contrasts with the fact that Adams did not, as far as is known, ask Trackling about North Roman Street. The petitioner surmises that this proves the existence of an as-of-yet undisclosed interview, even as the District Attorney's file contains no such second interview.

Finally, the petitioner directs this Court to a notation in Ronquillo's supplemental report referring to his interview with Trackling in July of 1995, during which Trackling denied his involvement in the North Roman Street murders and offered the alibi that he was at work when the crimes were committed. The report goes on to note that Ronquillo checked Trackling's time card and discovered that he did not clock out of work until 7:45 pm. The petitioner cites this as proof of Trackling's possible involvement in the North Roman Street murders, which did not occur until 8:30 pm. Police knowledge of Trackling's involvement, according to the petitioner, was evidenced by his being placed in photographic lineups shown to Reba Espadron and Larry Boatner, neither of whom identified him as a perpetrator. Upon that, the petitioner argues that police concealed Trackling's confession to his prejudice.

The petitioner's unwieldy allegation as to evidence of Trackling's supposed involvement in the North Roman Street murders fails to satisfy his burden under *Brady*. As an initial matter, Eric Rogers' testimony at trial—to the extent it tracked his police statement and post-conviction testimony—would have been inadmissible hearsay through Trackling and Detective Adams. Moreover, his undisclosed statement that Trackling admitted to committing the North Roman Street murders with Donielle Bannister and Robert Home is contradicted by his own post-conviction testimony that Trackling told him he committed the murders with Bannister and Romalice McGee. It is also contradicted by the other undisclosed evidence of which the petitioner complains—Trackling's own statements to Adams and Ronquillo denying his involvement in the North Roman Street murders. His statement regarding Romalice McGee's involvement was rebutted by Detective Ronquillo's post-conviction testimony that Larry Boatner was shown a lineup containing McGee's picture and was unable to identify him as one of the perpetrators.

Rogers' statement that "Short Dog" was Robert Home is contradicted by Trackling's identification of the petitioner as "Short Dog" as well as by the testimony of the petitioner's own sister, Trenieze Smith, at his related trial in the Morrison Road case, in which she acknowledged that she thought her brother went by the nickname "Short Dog." At the post-conviction hearing, she similarly testified that the petitioner was known as "Shorty." Furthermore, Rogers' post-conviction testimony that he in fact never received the sentence reduction that Adams allegedly offered him in return for implicating the petitioner contradicts his unsupported allegation—made 14 years after the fact—that Adams had coaxed him to do so. Finally, under Louisiana evidence rules,

Rogers' testimony would have been subject to impeachment through his conviction for second-degree murder, further damaging his credibility. Accordingly, Rogers' inconsistent and controverted statements—to the extent they were even admissible—would carry little evidentiary weight and the petitioner cannot therefore show that the trial jury would have been unreasonable in discrediting his testimony in light of the countervailing evidence.

As to Detective Adams' interview with Trackling, the petitioner fails to demonstrate that its substance is favorable to his defense. Indeed, disclosure of that statement would have only provided additional evidence implicating the petitioner in the North Roman Street murders by introducing another photographic identification and corroboration that his nickname was "Short Dog." Coupled with Eric Rogers' statement that "Short Dog" was involved in the North Roman Street murders, the effect would be highly prejudicial at trial. That Trackling was not questioned by Detective Adams about the North Roman Street murders during his June 1, 1995, interview means nothing; as the interview was explicitly concerned with his role in the Morrison Road case, it is not surprising that Adams did not delve into ancillary investigations. Even if the petitioner's allegation of an undisclosed second interview between Adams and Trackling, in which Trackling denied his involvement in the North Roman Street murders, were substantiated, that information would be merely cumulative of Trackling's interview with Detective Ronquillo, during which he denied the same. *See Drew v. Collins*, 964 F.2d 411, *supra*.

The petitioner further fails to show how Trackling's undisclosed interview with Detective Ronquillo, in which he denied his involvement in the North Roman Street murders, would have exculpated him in the same crime. The only evidence that the

petitioner advances in support of his argument is the fact that Trackling's time card showed that he was not at work, as he had told Ronquillo he was, at the time of the murders. However, Ronquillo testified that he found Trackling's denial credible because he had already confessed to being involved in the Morrison Road murder and Ronquillo "[didn't] see why he would confess to one murder and not the other." Moreover, the effect of disclosing Trackling's possible involvement to the jury would have been soundly rebutted by Ronquillo's testimony that Larry Boatner was shown photographic lineups including Trackling's picture and was unable to identify him as a perpetrator. The petitioner acknowledges that much, but still claims that police concealed the evidence of his supposed confession. However, as noted, the only evidence of Trackling's supposed involvement comes from the mouth of a convicted murderer who's credibility is undermined by the very evidence the petitioner complains was not disclosed to him. That evidence also reflects Trackling's implication of the petitioner in the murders by his nickname. Therefore, the petitioner's own argument defeats itself.

In any event, even assuming, *arguendo*, that the undisclosed evidence was somehow sufficient to convince the jury of Trackling's involvement in the North Roman Street murders, this would still not constitute material or even favorable evidence entitling the petitioner to *habeas* relief. As is by now well documented, both surviving eyewitnesses—Reba Espadron and Larry Boatner—testified that three to four subjects participated in the home invasion and killings, including the petitioner and likely Phillip Young. As noted, Sholita Russell also indicated that more than one subject entered the house, and Dale Mims likewise testified that he observed four men flee the scene after the shootings. Trackling's own alleged confession indicates that he committed the

murders with two other people—Donielle Bannister and "Short Dog," i.e. the petitioner. Thus, the evidence establishing Trackling's involvement in the crime would do nothing to negate the petitioner's own involvement; it would merely add another name to the indictment. The petitioner therefore cannot demonstrate that the jury would have been unreasonable in finding the evidence of his guilt sufficient nonetheless.

III. Subornation of Perjury

The petitioner alleges that prosecutors knowingly permitted Larry Boatner to testify falsely at trial. "To establish a due process violation based on the government's use of false or misleading testimony, the [petitioner] must show (1) that the witness's testimony was actually false, (2) that the testimony was material, and (3) that the prosecution knew the witness's testimony was false." *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).

It is self-evident that, before all else, the testimonial assertion in question must be demonstrably untrue. Even if proven as false, testimony will not be considered material unless the particular factual issue is a "highly significant factor" in the case, *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994), and there is "any *reasonable* likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103; 96 S.Ct. 2392 (citing authorities) (emphasis added). Finally, the petitioner must prove that prosecutors had, or should have had, actual knowledge of the falsity of the complained-of testimony. A showing of record discrepancies does not suffice to do so and "misperceives the burden placed on one who would secure *habeas* relief on this ground." *Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988).

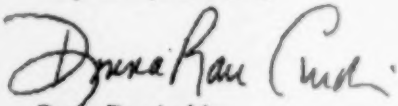
The petitioner has not met his burden of proving that Larry Boatner's trial

testimony was false. Moreover, he has not presented any evidence showing that prosecutors were, or should have been, aware of any such falsity. The issue of materiality is therefore moot, and, in any event, meritless.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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REPLY BRIEF

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2010

JUAN SMITH,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

REPLY BRIEF TO STATE'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. **Withholding of Evidence Regarding Eyewitness Identifications**

The State attempts to argue that Larry Boatner's undisclosed statements to the police were not inconsistent with his trial testimony because he was only "too scared to look at anybody after he had been ordered to the floor, which does not conflict with his statement and testimony that he was able to see and describe the petitioner prior to that moment." Opposition Brief at 11.

Police notes of an interview with Mr. Boatner clearly establish that the State is incorrect and that Larry Boatner initially told police that he could not identify anyone at anytime that evening. In fact, Boatner told the police that he wasn't sure if the man at the door had his face covered or not. See. EX. 2, pg. 3 Post-Conviction Hearing (NOPD dailies and notes):

> Could not ID anyone because couldn't see faces. Saw man through door. ....Can't tell if had face covered. Didn't see anyone. .... "Could not ID. Would not know them if I saw them."

Id.

This statement is markedly inconsistent with Boatner's trial testimony that he would never forget the face of the gunman as long as he lived.

At the post-conviction hearing eyewitness, Dale. Mims seemed unsure if two or three of the men were wearing masks when they exited the home. *Id.* Mr. Mims also did not recall being interviewed by the police. 1/13/09 Tr. 108.

The defense called Detective Ronquillo to testify regarding his interview with Dale Mims shortly after the shooting. According to Ronquillo, Mims told him all of the men were wearing ski masks:

Q. Okay. And, do you recall what Dale Mims told you?

A. Yes. He was in his house. He heard a lot of gunshots at about 8:30. And, he looked out of his window and he saw four men exit the house carrying rifles and having ski masks. He couldn't see any of their face.

Q. Okay.

A. They jumped in their car and they drove off.

1/22/09 Tr. 71-72.

A newspaper article in the Times-Picayune stated that police sources indicated that one woman who survived the Roman street shootings[1] told the police that four masked men committed the killings to avenge an earlier killing in the St. Thomas projects. Ex. 1, DA File, at 2434-35, 2346. Despite repeated requests under the Public Records Act, the State has failed to disclose the interviews that the police conducted with eyewitness Reba Espadron. Petitioner is entitled to these statements which, according to the newspaper accounts exist and impeach both Reba and Larry Boatner's trial testimony. Despite the fact that the trial court ordered the State to produce these interviews the State has not complied.

Larry Boatner first testified at a pre-trial hearing held on December 5, 1995 and later again, during the Roman Street trial, that Juan Smith was the first man who entered the door and that he was not wearing a mask. R. 154. According to the trial testimony, one

---

[1] Reba Espadron was the sole surviving female of the shootings.

of the victims, Shelita Russell, was conscious but unable to provide the police with any details of what happened.

However, according to notes of Russell's police interview obtained in post-conviction, Russell told police that she saw the first man who came through the door and that his face was covered by a black mask Ex. 2, NOPD Daily Notes and Status Reports, at 44.

The State failed to turn over interviews of four different eyewitnesses claiming that the gunmen were wearing masks and incredulously maintains that it does not understand how this evidence is material in a case where the conviction is based on a single eyewitness identification. Nor does the State seem to understand how evidence that the single eyewitness was harassed and coerced by police prior to making his identification is material. If the State truly does not understand the materiality of this evidence that may explain the number of *Brady* violations committed by the Orleans DA's office.

B. Detective Ronquillo Testified Falsely about Phillip Young's Medical Condition at Trial

During the Roman Street trial, the state maintained that Phillip Young, Juan Smith's codefendant, was in a vegetative state. In his opening statements the prosecutor referred to Young as "pretty much a vegetable". Roman St Transcript 22. Detective Ronquillo testified "[Young] really couldn't talk, he mumbled. He could use his left hand, that was all." Roman St Transcript 102. When the prosecutor asked Ronquillo "Was he able to communicate with you at all?" Ronquillo replied "No. I couldn't understand anything that he was saying. No." Roman St Transcript 103.

The common understanding of a vegetative state is someone who as a result of brain damage has no ability to communicate whatsoever. Webster's Dictionary describes someone in a vegetative state as being only able to breathe and perform bodily functions:

> *Vegetative*
>
> *b* : characterized by, resulting from, or being a state in which there is total loss of cognitive functioning and in which only involuntary bodily functions (as breathing or blinking of the eyes) are sustained

Documents obtained from the District Attorney file, however, reveal that Phillip Young's medical condition was *not* in a vegetative state at the time of trial. Even more egregious, NOPD daily reports indicate that Detective Ronquillo questioned Young about the events at Roman Street. According to the dailies, Young told police what actually happened at Roman Street, and told Ronquillo that *Short Dog was not present*. Detective Ronquillo thus lied about Phillip Young's medical condition when he testified at Mr. Smith's trial.

Despite having had a fruitful interview with Young, Detective Ronquillo testified at trial that Young was unable to communicate at all. Tr. 103.

The Prosecution Knew the Testimony of Ronquillo was False

The State knowingly presented the perjured testimony of Detective Ronquillo, who testified that Young was unable to communicate with him despite the fact that Ronquillo had personally interviewed Young about the shootings. Notes in the District Attorney file as well as in NOPD dailies indicate that Ronquillo questioned Phillip Young about the events at Roman Street. Ronquillo's trial testimony is contradicted by

his own daily police reports, and testimony at the post-conviction hearing which detail that Ronquillo did, in fact, communicate with Young regarding the Roman Street crimes during his visit. Thus, Ronquillo perjured himself at trial when he denied Young's ability to communicate (Tr. 103) and the State violated *Giglio* and *Napue* when it knowingly presented his perjured testimony.

The State alleging that the defense knew the true state of Young's medical condition is disingenuous. The defense like the jury were told that Phillip Young was practically a vegetable. The defense had no way of knowing that Phillip Young had answered questions regarding the crime and exculpated Mr. Smith. If Detective Ronquillo's testimony was not an outright falsehood it certainly gave a false impression to the jury regarding what Philip Young conveyed to Detective Ronquillo by nodding or shaking his head in response to questions about the crime. The fact that he did not speak does not mean he did not communicate relevant exculpatory information that was favorable to Juan Smith. At the post-conviction hearing , Petitioner called Barbara Riley, the head nurse at the Rehab Institute of New Orleans at the time when Phillip Young was receiving treatment at that facility after the Roman Street incident. 1/13/09 P.C. Hearing at 117. Mrs. Riley remembered Phillip Young, and testified that Young "did not speak" but was able to communicate by shaking his head yes or no when asked questions. *Id.* at 117-18. When questioned by the State about whether Young suffered from amnesia, Ms. Riley responded, "No, I recollect aphasia, a lack of speech." *Id.* at 120-21.

Ms. Riley was present for the entire length of the questioning, and witnessed the detective administer the Miranda rights to Mr. Young. *Id.* According to Ms. Riley, Mr.

Young communicated that he understood his rights and could answer the detective's questions. *Id.*

The False Testimony was Material

The State violated *Giglio*, 405 U.S. 150 (1972) and *Napue*, 360 U.S. 264 (1959), when it presented Ronquillo's perjured testimony that Phillip Young was unable to communicate with him. Both *Napue v. Illinois* 360 U.S. 264 (1959) and *Giglio v. U.S.* 405 U.S. 150 (1972) hold that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. ." *Id.* at 154 quoting *Napue*.

There is at least reasonably likely that Ronquillo's perjured testimony affected the judgment of the jury. Because of Ronquillo's false testimony, the jury never knew that Phillip Young's medical condition had improved, nor did they hear that police were able to interview Young. Even worse, the jury never heard Young's version of the events, which would have been crucial given that he acted in concert with the gunmen the night of the murders. Most egregious, the jury never heard Young state that Mr. Smith was *not* the shooter, and *was not even present* when the murders took place. It is at least reasonably likely that had the jury known this information, their judgment would have been affected.

In *Graves v. Dretke*, 442 F. 3d 334 (5th Cir.), cert. denied, 127 S. Ct. 374 (2006), the prosecution violated *Brady* when it failed to disclose statements by its critical witness, the alleged co-perpetrator of the murder. In one of the suppressed statements, the witness exonerated the defendant and claimed to have committed the murder by himself. The court found even more egregious than the prosecution's suppression of the statement, the

fact that the prosecutor knowingly elicited false and misleading testimony from the same witness, who testified that he had always implicated the defendant in the crime.

Here, as in *Graves*, the state allowed Detective Ronquillo to mislead the jury into believing that Young was unable to provide police with any statement detailing the true events at Roman Street, in clear violation of *Brady, Giglio and Napue*. *Graves v. Dretke*, 442 F. 3d 334 (5th Cir.). *S*

Accordingly, the prosecution's knowing presentation of Ronquillo's false testimony is a violation of *Giglio* and requires Mr. Smith's conviction be set aside.

The State's misconduct, and the denial of an opportunity to secure Mr. Young's testimony, violated Mr. Smith's right to compulsory process.

Few rights are more fundamental than that of the accused to present witnesses in his own defense. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Indeed, this Court has recognized that "this right is an essential attribute of the adversary system itself," *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

Hence, the Sixth and Fourteenth Amendments to the United States Constitution operate to ensure that no "unnecessary evidentiary rule, ...prosecutor's misconduct, or...arbitrary ruling by the trial judge" interferes with the fundamental right of the accused to present a defense in his own behalf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In this case, egregious misconduct by the prosecutor interfered with Mr. Smith's constitutional right to compel Philip Young, an eyewitness and co-perpetrator of the Roman street murders, to testify as to whether Juan was truly involved in the crime. Even if Mr. Young invoked his Fifth Amendment Rights, the State's failure to turn over interviews conducted with Young by Officer Ronquillo prevented the defense from calling Detective Ronquillo and potential other witnesses at Charity

Hospital with whom Mr. Young may have discussed details of the crime that were exculpatory to Mr. Smith.

In sum, the State alternately presents two misguided arguments. First, the State tries to blink away any *Brady* violation by claiming that Detective Ronquillo's hiding of Young's statements at trial wasn't really a non-disclosure, because it was just the detective's "subjective" interpretation that Young did not "communicate" anything. The State's more audacious alternate argument is that even if Detective Ronquillo *had* fully and accurately disclosed Young's statements, it wouldn't have mattered to the jury. The State here magically claims that it knows exactly how the jury would have reacted if they were told that Young had confirmed that Juan Smith had nothing to do with this crime.

Both arguments reveal that the State arrogantly continues to be out of touch with the reality and the mandates of *Brady*. It is not up to the detective to toss out exculpatory admissions on the flimsy pretext of subjectivity. It is not up to the State to decide how the totality of evidence might be weighed out. Rather, it is the State's obligation to reveal all of the favorable evidence and then it is the jury's role to be the fact-finder. The State failed those obligations, violated *Brady* and its progeny. Juan Smith was denied his rights to a fair trial.

C. Additional *Brady* Evidence Withheld about Robert Tackling's and Other Suspects' Involvement in the Roman Street Homicides

In his post-conviction application, the Petitioner alleged that the State violated its *Brady* obligations by suppressing exculpatory information contained in NOPD police reports and interviews. The State omits mention of these exculpatory reports and interviews in its response to this Court. According to NOPD police reports from May of

1995, Robert Trackling confessed to Eric Rogers, his cellmate at Orleans Parish Prison, that he was involved in both the Roman Street and Morrison Road murders. Post-conviction Ex. 1, DA File, at 3954-65. Trackling told Rogers that he was present in the house when the shooting at Roman Street occurred and that Donielle Bannister was the shooter. *Id.* Police interviewed both Rogers and Trackling about Trackling's involvement in the Roman Street incident but never disclosed these exculpatory statements to defense counsel.

On May 19, 1995, Eric Rogers was interviewed by the New Orleans Police Department and told detectives that Trackling had confessed to involvement in the Roman Street murders and had implicated Donielle Bannister. Ex. 1, DA File, at 3954-65. Roger's interview with police is as follows:

> A: Alright. I was on C4 and I got the information from Robert he came up on the (inaudible) where I'm at. And he told me about the first crime they done. He say they done it on N. Roman he said that it was him, Fat, Buckle and a guy they call Short Dog. Say they went up to the door and they knocked on the door and the guy open the door and they went in the house and they had about 7 guys in there. And they made 'em lay down on the floor and they was asking the guys where where's the stuff and the guy didn't say nothing. They say that they had a girl in the um, room she open the door and when she open the door all of 'em turned around and say one of the guys that was on the floor jumped up and grab his gun from under his shirt and went to shooting at her. They say that they raised up the gun and they went to shooting them. They went to shooting back and hit them and say one of the guys who was shooting that got off the floor his gun slid by um Darnell Banister foot, and Darnell Banister picked up his gun and went to shooting the guy with that guy [sic:gun].
>
> Q: Then what transpired then what happened?
>
> A: Then after that he say that they left they left because they couldn't stay long because they had too much of the gun from the fire, they had too much noise and they had left.

Post-Conviction Ex. 1, DA File, at 3956 (*emphasis* added).

> Q: When he explain to you about N. Roman incident, did he tell you how they made good their escape were they in a vehicle, did they run off foot, did he explain to you?
>
> A: He said that they got in a car he said that the car was burgundy, a burgundy car.

Ex. 1, DA File, at 3957.

Eric Rogers further elaborated on the identity of the perpetrators of the Roman Street shootings and of the members of the Cut Throat Posse:

> Q: Okay do you know who Fat is, what's [sic] his real name is?
> A: Yes his real name is Darnell Banister.
>
> Q: Can you describe Buckle to me?
> A: Yeah his real name is Contez Phillips...
>
> Q: Do you know Short Dog?
>
> A: No but Robert describe 'em to me.
>
> Q: Do you know Short Dog's real name did he tell you his real name?
>
> A: He say [sic] his real name is Juan but he didn't give me no last name.

Ex. 1, DA File, at 3959.

> Q: These guys Fat, Buckle, and Short Dog do they have a name for themselves so they call themselves anything?
>
> A: They call Contez Phillip Buckle, they call Darnell Banister Fat, Short Dog that's what they call him, they call Robert Home.
>
> Q: But do they have a name for their group?

A: Oh yeah, they call their self Cut Throat Posse

Q: And where do they mainly hang out at?

A: They the Cut Throat they was hanging in St. Andrew.

Ex. 1, DA File, at 3960 (emphasis added).

When police questioned Rogers further on the Cut Throat Posse, Rogers gave police a long list of members of the Cut Throat Posse, and a list of murders for which they claimed to have been responsible.2 At no point in this laundry list of people associated with the Cut Throat Posse did Rogers bring up Juan Smith's name. Trackling's own statement places himself, Bannister, and Phillip Young in the house. Trackling did not mention that Phillip Young was present, yet it is clear that Young was involved since he was found wounded at the scene and was a stranger to Rebe Espadron and Larry Boatner. Therefore, either Juan Smith was outside the house when the shooting took place or Phillip Young is the man Trackling called "Short Dog."

If Juan Smith was outside the Espadron residence when the shooting took place, there were five men involved in the incident. Accounts from witnesses that night, however, indicate there were only four men involved, and only three gunmen who went inside the Espadron residence.

Trackling's confession to Eric Rogers that Kincaid Phillips and Donielle Bannister were involved in these shootings was corroborated by other undisclosed *Brady* evidence.

Michelle Branch was the girlfriend of Phillip Young, Mr. Smith's co-defendant in the Roman Street case. On March 6, 1995, she was interviewed by police via telephone

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about Phillip Young's participation in Roman Street. According to Branch, the last time she saw Phillip Young was on March 1, 1995 at around 6:00 p.m. when he left her house with her car. DA 3751. Branch described her car as a beige Chrysler LeBaron that is often mistaken for white at night. *Id.* She also said the car had a bad muffler which made the car very loud. She told police "everyone knew when you were coming with that car." Id. Branch also told police that the day after the shootings, on March 2, 1995, she received a telephone call from an unknown person who stated that Kintaid Phillips was driving her car around the Calliope Housing Project. *Id.* Branch told police that Phillips was with Donielle Bannister and that they had killed people before. DA file 3751; DA file 3757.

On March 13, 1995, Michelle Branch gave police a tape-recorded statement, which confirmed what she told police on the telephone. DA 3759; 4301-06. She again told police that she had last seen Philip Young when he took her car on March 1, 1995, at about 6:30 pm, and had not heard from him since that date. *Id.* She described her car as a light yellow Chrysler LeBaron, with no muffler, and added that the car would look white at night. *Id.* She also told police that she had received phone calls from unknown individuals who told her that Kintad Phillips had been seen driving her car around. *Id.*

Branch's description of her car matches Boatner's description of the car the suspects were driving. Boatner told police that on the night of the shooting he went to the door and saw three armed men exit an old white four door car with a loud muffler. DA file 3728. Reginald Harbor also reported hearing the gunmen drive off in a car with a very loud muffler. DA 003743.

Moreover, Michelle Branch's statements also reveal that immediately after the shootings, Kintaid Phillips was seen driving the car Philip Young had been driving. This evidence implicates Kintaid Phillips in the Roman Street crimes, which police suspected from the start of their investigation. Indeed, Kintaid Phillips was the prime suspect, as policed discovered that he had sent Phillip Young's beeper the message "187" on the night of the shootings. DA 3737. According to police, 187 is the code for homicide in California, "the number used in 'rap' songs to imply murder," and a common slang term for murder on the street. *Id.* Police thus focused on Kintaid Phillips and his known associates in their investigation. DA 3751-3756. Notably, Juan Smith was never included as an associate of Phillips or Bannister. However, Robert Trackling was a known associate, in jail for a shooting of a thirteen year old girl along with Donielle Bannister and Romalice McGee.

At trial, the State argued that four men were involved in the shooting, three inside the house and one outside. Michelle Branch's statement, taken together with Trackling's confession and the message Kintaid Phillips sent to Phillip Young, provides powerful exculpatory evidence that the four men involved in the Roman Street murders were Robert Trackling, Donielle Bannister, Kintaid Phillips and Phillip Young, and not Juan Smith. This evidence obviously exculpates Mr. Smith, and should have been disclosed to the defense prior to trial.

The *Brady* doctrine requires the state to disclose all favorable material evidence, including both exculpatory and impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, (1995); *United States v. Bagley*, 473 U.S. 667, 676 (1985). Where the State possesses

information indicating that another person committed the crime with which the accused has been charged, it must disclose that evidence to the defense. *Scott v. Mullin*, 303 F.3d 1222 (10th Cir. 2002) (finding *Brady* violation where the state suppressed evidence of a third party's confession to the murder); *Miller v. Angliker*, 848 F.2d 1312 (2nd Cir. 1998), cert. denied, 488 U.S. 890 (1988) (granting habeas where the state withheld evidence which indicated that another person had committed the crimes with which defendant was charged); *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d (10th Cir. 1995), cert. denied, 116 S. Ct. 272 (1995) (finding *Brady* violation and granting habeas where material evidence relating to another suspect was not disclosed). Similarly, where an individual other than the defendant confessed to the crime with which the defendant has been charged, it is evidence "undeniably favorable" to the defendant, and clearly falls within the purview of *Brady*. *Scott v. Mullin*, 303 F.3d 1222, 1230 (10th Cir. 2002) (an alleged confession by an individual other than the defendant "is undeniably favorable" to the defendant). Even if the evidence of third party guilt could only be used as impeachment evidence, it is still subject to disclosure under Brady. *Id.*, at 1231; *See also United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992) (holding that a witness' false statements could have been used by the defense to undermine the witnesses' testimony and should have been disclosed under *Brady).*

Here, Trackling's alleged confession to the Roman Street crimes was favorable evidence that the State should have disclosed, as it both exculpated Mr. Smith and could have been used to impeach the eyewitness testimony. The State's argument that Eric Roger's testimony was inadmissible hearsay ignores this Court's ruling in *Chambers v. Mississippi* 410 U.S. 284 (1973). Both this Court and the Louisiana Supreme Court have

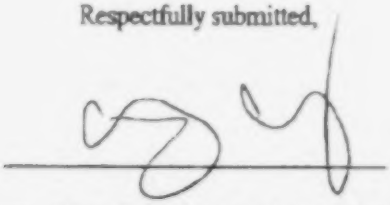
specifically held that rules of evidence, including the hearsay rule, must yield to a criminal defendant's paramount right to present a defense when the evidence he seeks to introduce bears adequate indicia of reliability. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979); *see also Gray v. Klauser*, 282 F.3d 633 (9th Cir. 2002) (*arbitrary* exclusion of hearsay statement implicating third party violated right to present a defense).

Furthermore, the State's argument that Trackling's confession to Eric Rogers was damaging to Juan Smith is unsupported by the record. In the undisclosed police interviews Rogers stated that the only person he know that was called "Short Dog" was Robert Home. Rogers never stated that "Short Dog" was Juan Smith or that Trackling identified "Short Dog" as being Juan Smith. In his post-conviction testimony, Rogers stated that it was Detective Adams who told him that "Short Dog" was involved in the Roman Street murder and was named Juan Smith. Detective Adams told him this prior to speaking to Robert Trackling.

CONCLUSION

Wherefore, for the foregoing reasons, Mr. Smith respectfully moves the Court to grant review of this matter and reverse Mr. Smith's conviction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Writ Certiorari upon counsel for opposing party, by depositing a copy of same by means of U.S. Mail, and sending it to the following address:

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JOINT APPENDIX

SUPREME COURT, U.S.
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No. 10-8145

In the Supreme Court of the United States

JUAN SMITH, PETITIONER

v.

BURL CAIN, WARDEN

ON WRIT OF CERTIORARI
TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT
OF LOUISIANA

JOINT APPENDIX

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Articles from New Orleans Times-Picayune (June 7, 1995) 582

The following rulings and orders have been omitted in printing the joint appendix because they appear as appendices to the petition for certiorari as follows:

Appendix A: Transcript of the oral ruling of the Orleans Parish Criminal District Court denying petitioner's application for state postconviction relief (Feb. 2, 2009)

Appendix B: Unpublished order of the Louisiana Fourth Circuit Court of Appeal denying petitioner's application for supervisory writ (Apr. 29, 2009)

Appendix C: Unpublished order of the Louisiana Supreme Court denying petitioner's application for supervisory writ (Sept. 24, 2010)

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
10/19/1995	The defendant Young appeared before the bar of the court attended by counsel, Mr. Harry Tervalon Esq. for a lunacy hearing. The state and defense being ready the court convened a lunacy hearing on the defendant's sanity. The court filed into the record the doctors reports. The court ruled after reviewing facts of the case and various reports from other psychiatrists, the defendant will never be able to assist his counsel in trial due to perminent brain damage. Order to

be transported to Villa Felicana in Jackson.

* * * * *

12/15/1995 As to Defendant Juan Smith, Life in doc on each count (5 counts). All counts to run concurrent with each other. All conts without benefit of probation, parole or suspension on sentence. All other defendants were present in court for status hearing. As to Phillips, Bannister, Trackling and Smith trial is set for 3/25/96.

* * * * *

12/05/1996 At 10:30 a.m., jury returned to open court, in the presence of defendant Smith, his counsel and the state, court ordered the trial to continue. State marked S-145 thur S-152. State offered, filed and introduced the following exhibits into evidence, S-1 thur S-152. Court allowed the jury to view the evidence introduced by the state and admitted by the court. State then rested. Defense marked no exhibits and rested its case. Jury retired to deliberate. At 5:55 jury retired to deliberate in this matter. At 7:40 p.m. jury returned with the following verdict "guilty as charged of first degree murder as to all counts". Court ordered the verdict recorded in the record and dismissed the jury for the day. Court recessed at 7:45 p.m. Court ordered

jury not to view the news on TV, read the newspaper, and not to talk about this case with anyone. Court dismissed jury for the day and ordered them to return to court on 12/7/96 at 9:30 a.m. for the penalty phase.

12/07/1996 At 10:30 p.m., jury returned into open court, in the presence of defendant Smith, his counsel, and the state. Court ordered the penalty phase of the trial to proceed. State marked the following exhibits, SP-1, SP-2 thur SP-19. SP-20 thur SP-22. State offered, filed and introduced the following exhibits into evidence, SP-2 thur SP-22. Defense offered, filed and introduced the following exhibits DP-1 and DP-2. Jury retired to deliberate in the matter. As to defendant Devny Thompson: defendant sentence to death. 1) The offender knowingly created a risk of death of great bodily harm to more than person. 2) Offense was committed in an especially heinous, atrocious or cruel manner. 3) Victim was under the age of tweleve or older than sixty five. As to defendant Tangie: sentence to death: found 1) offender was engaged in the perpetration of attemepted perpetration of aggravated rape, forcible rape, aggravated kidnapping, agrravated burglary, aggravated arson, aggravated escape, armed robbery, first degree robbery or simple robbery. 2) Offender has previously been

convicted of an unrelated muder, aggravated rape, aggravated burglary, aggrabated arson, aggravated escape, armed robbery or aggravated kidnapping. 3) Offender knowingly created a risk of death of great bodily harm to more than one preson. 4) Offense was commited in an especially heinous, atrocious or cruel manner. As to defendant Andre White: jury having found: 1) offender was engaged in the perpetration of attempted perpetration of aggravated circumstance or circumstances, and after consideration of mitigating circumstances offered, unanimously determines that the defendant be sentence to death. 1) Offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, aggravated burgrlay, aggravated arrson, aggravated escape. Armed robbery or aggravated kidnapping. 3) Offender knowingly created a risk of death of great bodily harm to more than one person. 4) Offense was committed in an especially heinous, atrocious or cruel manner. Defense requested that the court poll the jury. Court ordred the jurey polled. The result of the poll was 12/0. Court set sentencing for 12/19/96 and ordered defendant remanded. PDOJL. Court

ordered a pre-sentencing investigation be performed on defendant Smith.

* * * * *

12/19/1996 Defenedant Trackling appeard in court attended by counsel Charles Elloie, Esq. for sentencing. Defendant, thru counsel requested immediate sentencing. As to each count: 10 years Dept. of Corrections at hard labor credit for time served from date of arrest. This sentence to run concurrently with any other sentence. The Court continued the sentencing for defendant *Smith* and ordered the Department of Public Safety conduct a presentencing investigation and set this matter for sentencing on 1/21/97. Notify Frank Larre'. PDOJL

* * * * *

7/30/1997 Defendant Smith appeared in court attended by counsel, Mr. Frank Larre', Esq. for sentencing. On all three counts the court senttenced defendant Smith to death by lethal injection at Angola State Penitentiary. The date and hour of the execution will be determined by this court after all appeals in this case are exhausted. The counsel for the defense moved the court for an appeal and the court set this matter for an appeal status on 8/14/97. The state will file a writ of habeas corpus ad prosequen dum.

* * * * *

4/08/1998 Defendant Bannister appeared before the bar of the court attended by counsel, R. Teissier, Esq. and thru counsel withdrew the former plea of not guilty and entered a plea of guilty as charged defendant thru counsel requested immediate sentencing. As to each count: life-Dept. of Corrections at hard labor. Credit for time served from date of arrest. Court cost waived. Sentence is to be withour benefit of parole, probation, or suspension of sentence. The sentence to run concurrent with any other sentence now serving.

* * * * *

8/07/1998 Court reconvened at 12:50 p.m. State marked the following exibits into evidence: S-1 thru S-36; S-89; S-90; S-117 thru S-129; S-139 thru S-165. State introduced everything into evidence except S-125, S-147 thru S-154, S-145, S-148, and S-143. Court allowed the jury to view the evidence introduced by the state and admitted by the court. State then rested its case. Defense called no witnesses. Defense introduced nothing into evidence. Defense rested its case. At 7 p.m the jury retired to delliberate. Jury returned in the presence of the defendant, his counsels and the State

and requested information as to the law of first and second degree murder. At 8:40 p.m. the jury retired to deliberate and at 9:25 p.m. returned with all parties present with the following verdict: we the jury find the defendant, guilty as charged as to Devin Thompson, guilty as charged as to Andre White, and guilty as charged as to Tangie Thompson. Jury polled was 12/0 as to all three counts. Court ordered the verdict recorded in the recorded and dismissed the jury for the night. Defendant remanded in court

8/08/1998 Court reconvened at 12:45 p.m. to begin penalty phase. State introduced the following exhibits S-1 and S-2; SE 1-164, S-3 of case# 348-011. Court allowed jury to view the evidence introduced by the State and admitted by the court. State then rested its case. State called no witnesses. At 2:40 p.m., jury retired to deliberate and returned to court with all parties present with the following recommendation: jury unanimously recommends that defendant Phillips be sentenced to life imprisonment without the benefits of probation, parole or suspension of sentence. As to the involvement in the deaths of Tangie Thompson and Andre White. As to the count against Devin Thompson, court declares a mistrial court ordered recommendation recorded in the record and dismissed

the jury. Defendant, thru counsel waived all legal delays and choose to proceed directly with sentencing. Since the jury could not unanimously decide as to the charge regarding Devin Thompson, court sentenced defendant to to life imprisonment without the benefits of probation, parole, or suspension of sentence. Sentence is to be consecutive. Case closed as to Kintad Phillips.

* * * * *

8/27/2008 >The defendant, Juan A Smith appeared for post conviction hearing with counsel, Cathy Kelly ADA Donna Andrews appeared for the state. The defense filed: -supplemental petition for Postconviction relief. >post conviction hearing set for 09/30/08 >notify def. counsel.

* * * * *

1/13/2009 > The defendant, Juan A Smith appeared for evidentiary hearing with counsel, Cathy Kelly and Kristen Stanley. The defense called as witnesses DW-1 Frank Larre, DW-2 Barbra Riley, DW-3 Eric Rogers. The defense marked, filed and introduced into evidence DE-1 D.A. file documents in globo, DE-2 daily and status reports in globo. The state called as a witness SW-1 Dale ONeil Mimms, Sr. The state marked, filed and introduced into

evidence SE-A photo of house, SE-B photo of house >evidentiary hearing set for 01/14/09 D.O.C. was given notice in open court for the defendant.

1/14/2009 >The defendant, Juan A Smith appeared for post conviction conviction hearing with counsel, Cathy Kelly and Kristen Stanley. A.D.A.'s Donna Andrews and Alyson Graugnard appeared on behalf of the state. The defense called as a witness Jamie Mills. The state called ass witnesses SW-2 Larry Boatner, Jr., SW-3 Triniece Smith. The state offered, filed and introduced into evidence SE-C copy of a newspaper article. >post conviction hearing set for 01/22/09 the state and the defense will file instanter subpoena's.

1/22/2009 >The defendant, Juan A Smith appeared for post conviction conviction hearing with counsel, Cathy Kelly and Kristen Stanley. A.D.A.'s Donna Andrews and Alyson Graugnard appeared for the state. The defense called as a witness DW-1 Ret/Det. John Ronguillo. The defense offered filed and introduced into evidence DE-3 supplemental police report (pages 32 & 34) DE-4 crime lab report. The court held this matter open for the defense. >post conviction hearing set for 02/02/09 >Notify def. counsel. D.O.C.

was given notice in open court for the defendant.

2/02/2009 >The defendant, Juan A Smith appeared for post conviction hearing with counsel, Cathy Kelly A.D.A. Donna Andrews appeared on behalf of the state. The defense called as a witness DW-1 P/O Michael Mimms. The state called as a witness Sgt. Archie Kaufman. The court denied post conviction as to the non capital case. The defense gave oral notice of intent to seek a writ. The court gave the defense till 03-02-2009 to seek a writ. >hearing on writ(s) set for 03/02/09 >defendant's presence not required.

* * * * *

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

PHILLIP YOUNG

COURT MINUTE ENTRIES

Thursday, October 19, 1995

* * * * *

The court ruled after reviewing facts of the case and various reports from other psychiatrists, the defendant will never be able to assist his counsel in trial due to permanent brain damage.

* * * * *

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH
DANIELLE BANISTER
ROBERT TRACKLING
KINTAD PHILLIPS

COURT MINUTE ENTRIES

Friday, October 27, 1995

* * * * *

The court ordered the state to turn over all police reports to the defense by 10/30/95.

* * * * *

Thursday, November 9, 1995

The status hearing is completed. The state file incident and supplemental reports and memos.

* * * * *

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

COURT MINUTE ENTRIES

Tuesday, December 5, 1995

* * * * *

Count one:

> "We, the jury, find the defendant, guilty as charged (Ms Shelita Russell)

Count two:

> "We, the jury, find the defendant, guilty as charged (Mr Willie Legget)

Count three:

> "We, the jury, find the defendant, guilty as charged (Mr Ian Jackson)

Count four:

"We, the jury, find the defendant, guilty as charged (Mr James Jackson)

Count five:

"We, the jury, find the defedant, guilty as charged (Mr Robert Simons).

* * * * *

December 15, 1995

As to defendant Juan Smith — Life in doc on each count (5 counts) — all counts to run concurrent with each other — all counts without benefit of probation, parole or suspension on sentence.

* * * * *

December 5, 1996

* * * * *

"We, the jury, find the defendant, guilty as charged of first degree murder as to all counts."

* * * * *

December 7, 1996

The court ordered the jury not to the court then charged the jury as to the law applicable in the above case. The jury then retired to deliberated. At 6:00 p.m. the jury retired to deliberate in the above matter and at 7:30 p.m. returned into open court with all parties present with the following verdicts:

As to Devyn Thompson: "We, the jury, having found the below listed statutory aggravating circumstance or circumstances, and, after consideration of mitigating circumstances offered,

unanimously determines that the defendant be sentenced to death. 1) The offender knowingly created a risk of death of great bodily harl to more than one person. 2) The offense was committed in an especially heinous, atrocious or cruel manner. 3) The victim was under the age for twelve or older than sixty five.

As to Tangie Thompson: "We, the jury, having found the below listed statutory aggravating circumstance or circumstances, and, after consideration of mitigating circumstances offered, unanimously determines that the defendant be sentenced to death. 1) The offender was engaged in teh perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, aggrabated burglary, aggravated arson, aggravated escape, armed robberty, first degree robbary or simple robbery. 2) The offender has previously been convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery or aggravated kidnapping. 3) The offender knowingly created a risk of death of great bodily harl to more than one person. 4) The offense was committed in an especially heinous, atrocious or cruel manner.

As to Andre White: "We, the jury, having found the below listed statutory aggravating circumstance or circumstances, and, after consideration of mitigating circumstances offered, unanimously determines that the defendant be sentenced to death. 1) The offender was engaged in teh perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, aggrabated burglary, aggravated arson, aggravated escape, armed

robberty, first degree robbary or simple robbery. 2) The offender has previously been convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery or aggravated kidnapping. 3) The offender knowingly created a risk of death of great bodily harl to more than one person. 4) The offense was committed in an especially heinous, atrocious or cruel manner.

IN THE DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA, SECTION "D"

No. 378-102

STATE OF LOUISIANA

v.

JUAN SMITH

September 12, 1995

MOTION FOR DISCOVERY OF INFORMATION NECESSARY TO A FAIR TRIAL

COMES NOW, JUAN SMITH, by counsel, and moves this Court pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 2, 3, 5, 13, 14, 16 & 17 of the Louisiana Constitution to order discovery of information necessary to a fair trial. In support of his motion, JUAN SMITH states as follows:

I. EFFECTIVE DISCOVERY MUST BE ORDERED IN THIS CASE.

1. Discovery certainly includes materials which are "favorable to the defendant and material and relevant to the issue of guilt or punishment." State v. Felde, 422 So. 2d 370, 383-84 (La. 1982), cert. denied,

461 U.S. 918, 103 S. Ct. 1903, 77 L. Ed. 2d 290 (1983) (citing *La. C. Cr. Pro. Arts. 718, 723).*

A. The Right To Expanded Discovery In Capital Cases.

2. This being a death penalty case, the accused is entitled to procedural protections that might not be required were the stakes not so grave. As the Louisiana Supreme Court has held, "[d]eath, in its finality, differs more from life imprisonment that a 100-year term differs from one of only a year of two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the jury's determination that death is the appropriate punishment in a specific case." State v. Myles, 389 So. 2d 12, 30 (La. 1980) (citing cases).

* * * * *

II. THE REQUESTED DISCOVERY

18. JUAN SMITH therefore requests prompt discovery of all the items listed below, as well as such other discoverable materials not requested by specific designation. If the discovery is less than prompt, he cannot be expected to prepare for trial. His requests are predicated on the United States Constitution, as well as upon state law.

19. *Definition of Terms:* As used in the following demands for discovery, JUAN SMITH intends to the following terms to be construed in their normal, everyday use, and to include the definition included below:

(a) Records: "Records" shall include, but not be limited to, all documents, memoranda and writing, and shall also include memorializations (which may

have to be created for purposes of this discovery demand) of oral communications relating to the discovery requested.

(b) State actor: "State actor" shall include, but not be limited to, any person who works for, or performed a task of any kind for, any District Attorney's Office; any prosecutor's offers (state or federal) with relevant information in the United States; any Sheriff's Department; any Police Department; any other law enforcement agency, state or federal; any Crime Laboratory; any State Hospital; any other state agency, including but not limited to the Board of Pardons & Parole, the Department of Corrections, and the Highway Patrol.

A. Prosecution Witnesses.

20. JUAN SMITH demands discovery concerning prosecution witnesses in various categories:

(a) Unfavorable evidence of any sort concerning prosecution witnesses, including:

(i) all juvenile detention, jail, prison, parole, probation and presentence investigation records;

(ii) all arrest, conviction, and adult and juvenile criminal offense records, Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980) (habeas relief granted due to suppression of victim's rap sheet); State v Miles, 569 So. 2d 615 (La. 1990) disclosure of rap sheets of "principal" witnesses); State v. Laird, 551 So. 2d 1310 (La. 1989) (ordering disclosure of rap sheets of all state witnesses); State v. Toledano, 391 So. 2d 817 (La. 1980); State v.

Harvey, 358 So. 2d 1224 (La. 1978); State v. Henderson, 362 So. 2d 1358 (La. 1978) (victims).

(iii) all records of any law enforcement authority;

(iv) all records of any court authority,

(b) Evidence tending to prove that the police investigation was conducted in a sloppy or slanted manner. Lindsey v. King, 769 F.2d 1034, 1042-43 (5th Cir. 1985) (failure to disclose impeachment evidence might have had effect of the "discrediting, to some degree, of the police methods employed in assembling the case against him"); Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986), *cert. denied*, 479 U.S. 962, 107 S.Ct. 458, 93 L. Ed. 2d 404 (1986) ("The withheld evidence also raises serious questions about the manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial. A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation").

(c) Any and all other information respecting any prosecution witness which is favorable to the defendant on the issue of guilt;

(d) Statements made by any persons which are exculpatory with respect to the defendant, including all statements made by prospective witnesses.

(e) Witness falsehoods or lies even though unconnected to the case. United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993) (informant may have lied to government about prior homicide).

(f) Anything that would tend to impeach a prosecution witness's testimony including:

(i) Evidence that the witness failed a polygraph test. United States v. Lynn, 856 F.2d 430 (1st Cir. 1988); United States v. Lindell, 881 F.2d 1313, 1326 (5th Cir. 1989) *cert. denied*, 496 U.S. 926, 110 S.Ct 2621, 110 L. Ed. 2d 642 (1990) ("[i]mpeachment evidence includes the results of a polygraph test").

(ii) Evidence that any witnesses were drunk or drugged, or were otherwise disabled in their ability to observe the crime or relate relevant facts. Williams v. Whitley, 940 F.2d 132, 134 (5th Cir. 1991) ("Whether Mrs. King, the only eyewitness had ingested drugs . . . was of obvious relevance and . . . should have been presented to the trier of fact . . . .").

B. Statements By The Accused.

21. Pursuant to *La. Code. Crim. Proc. Art 716(A)*, the accused moves for production of any "written or recorded confession or statement of any nature" which he is alleged to have made.

22. Pursuant to *La. Code. Crim. Proc. Art. 716(B)*, the accused moves for the disclosure of the existence of any oral confession or statement which he allegedly made which the prosecution intends to offer in evidence, with a statement concerning when, where and to whom such oral confession or statement was made. These statements must be disclosed,

regardless of whether they are said to be *res gestae*. State v. Freeman, 447 So. 2d 1145, 1153 (La. App. 3d Cir. 1984) ("a defendant is entitled to discover the existence, if not the contents, of res gestae statements under LSA-C.CR.P. art. 716(b)") (citation omitted): State v. Nogess, 490 S. 2d 488 (La. App. 4th Cir. 1986) ("Those cases which have addressed the applicability of Art. 716(B) to *res gestae* have held that they are discoverable") (citations omitted).

23. Pursuant to La. *Code. Crim. Proc. Art. 716(C)*, the accused moves for disclosure of the substance of any oral statement he is alleged to have made, either before or after arrest, in response to interrogation and which the state intends to offer in evidence.

24. Pursuant to his state and federal constitutional rights to due process and reliable capital sentencing, the accused moves for production of the particulars of any statement which he is alleged to have made in any form, to any witness, which has any bearing on this prosecution, regardless of whether the statement is or is not recorded, regardless of whether the statement was or was not the product of interrogation, regardless of whether the statement is exculpatory or inculpatory, regardless of whether or not the accused was under arrest, and regardless of whether or not the discovery articles mandate production of such statements. This request contemplates production of the name and address of the person[s] to whom the statement[s] was [were] made, including but not limited to those relevant to:

(a) The alleged crime;

(b) The investigation of that crime;

(c) Any condition of the defendant, including but not limited to his mental or physical state;

(i) at the time of the alleged crime;

(ii) at the time of any statements of the defendant as described in paragraphs (a) through (c) above;

(iii) at any other time prior to or subesequen tto the alleged crime.

C. Prior Criminal Record of the Accused.

25. Pursuant to *La. Code Crim. Proc art. 717*, the accused moves for production of a copy of any record of his criminal arrests and convictions. State v. Meshell; State v. DeMoss, 582 So. 2d 964 (La. App. 2d Cir. 1991). This request specifically contemplates disclosure of the defendant's rap sheet, including any and all juvenile charges and adjudications.

D. Documents and Tangible Objects.

26. Pursuant to *La. Code Crim. Proc. art. 178*, the accused moves for an order permitting him to inspect and copy all books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, which are within the possession custody or control of any state actor and which are favorable to the defense, are intended for use by the State as evidence at trial, or were obtained from or belong to the accused.

E. Scientific Tests and Experiements.

27. While this may be addressed in greater detail in other motions, Mr. SMITH specifically

requests the production of scientific and forensic evidence, expert notes, records and expert reports.

F. Evidence Of Other Crimes.

28. Pursuant to *La. Code Crim. Proc. Art 720*, the accused moves for an order directing the prosecution to inform him of its intent to offer evidence of the commission of any other crime admissible under the authority of Louisiana Code of Evidence art. 404. The accused requests a full description of the nature of such crime and a statement of how the crime fits within any of the exceptions of art. 404. In State v. Jackson, 608 So. 2d 949 (La. 1992), the court noted that "[t]he defense moved for production of police reports and witness lists relating to evidence of other crimes on which the prosecutor intends to introduce evidence. Initial reports are public records and subject to discovery." Id. at 957.

G. Statements of Co-conspirators.

29. Pursuant to *La. Code Crim. Proc. art. 721*, the accused moves for an order directing the prosecution to inform him of the state's intent to use statements of any alleged co-conspirators pursuant to art. 801(d)(3)(b) of the Evidence Code. The accused requests production of these statements even if they are alleged to be *res gestae*.

H. Statements of Co-defendants.

30. Pursuant to *La. Code Crim. Proc. art 722*, the accused moves for production of any confessions or statements (inculpatory or exculpatory) made by the codefendant in this case. State v Eaker, 380 So. 2d (La. 1980).

I. Witness Statements and Police Reports.

31. The accused requests a copy of all statements — in whatever form — by any witnesses, whether such witnesses are expected to testify or not, which are in the files of any state actors and which relate to this prosecution. Clearly, the initial police report must be disclosed pursuant to La. R.S. Sec. 44:3(A)(4). In State v. Ward, 483 So. 2d 578 (La. 1986), the Court observed that "initial police reports are public records." Id. at 583 (citing State v. Shropshire, 471 So. 2d 707 (La. 1985)). See also State v. McEwen, 504 So. 2d 817 (La. 1987).

32. The accused also moves for production of all other witness statements, whether contained in supplemental police reports, grand jury transcripts, the prosecutor's file or in any other form. It may be that prevailing *public records act* law allows access to these documents only after the prosecution has been concluded. See generally, Trenticosta v. Mamoulides, 633 So. 2d 786 (La. App. 5th Cir. 1994). However, this is not controlling in the context of criminal discovery since it conflicts both with common sense and the accused's rights. The defendant's right to disclosure of this information is two-fold. First, as developed below, it is clear that his due process right to production of all exculpatory evidence simply cannot be protected by trusting the prosecutor to produce such evidence. Nor will an *in camera* review by the Court always protect the defendant's rights. The second reason is that the withholding of this material turns a capital trial into little more than ambush and gives the State a lopsided advantage that is antithetical to notions of due process.

33. Turning first to the issue of protecting the defendant's Brady rights, experience teaches us that we cannot trust the fox to guard the hen house. Indeed, the jurisprudence reveals that, even in capital cases, prosecutors frequently suppress favorable evidence contained in police reports. See e.g. Kirkpatrick v. Whitley, 992 F.2d 491, 496 (5th Cir. 1993) ("Although Kirkpatrick's trial counsel made a Brady request before trial, the [exculpatory] statements, indeed the very identity, of the first two officers on the murder scene were not discovered at trial because the then-controlling state law would not permit discovery of the initial police report"); Williams v. Whitley, 940 F.2d 132, 133-34 (5th Cir. 1991) ("The evidence in question, an official police report from the day of the murder, contained information that had obvious relevance to testing, *i.e.* impeaching, the credibility of . . . the state's only witness who connected Williams to the murder"); Lindsey v. King, 769 F.2d at 104 (failure to disclose police report containing eyewitness's prior statement impeaching trial testimony that he saw the offender's face "would be reprehensible in an ordinary case; where a man's life is at stake, it is beyond reprehension"); State v. Knapper, 579 So. 2d 956 960 (La. 1991) ("The evidence [contained in police reports and not produced at trial] could have had significant value in creating a reasonable doubt that did not otherwise exist in a capital case which relied almost solely on the suspect testimony of an accomplice who turned state witness to avoid the electric chair"); State v SMITH, 600 So.2d 919, 922 (La. App. 4th Cir. 1992) ("In SMITH's case, the State should have provided the report to the defendant in that evidence

that the victim first gave another name as the perpetrator was exculpatory for the defendant").

34. Prevailing Louisiana law provides for a least an in camera inspection of these materials by the trial court. See, e.g., State v. Jackson, 614 So.2d 1246 (La. 1993) ("The trial judge is ordered to conduct an in camera inspection and review of 1) any evidence in the State's possession which would adversely affect the credibility of any of its witnesses; and 2) the statements of any person interviewed by an agent of the State which may be favorable to the defendant and/or material and relevant to the issue of guilt or punishment". State v. Moore, 617 So.2d 483 (La. 1993) ("the case is remanded to the trial court conduct an in camera inspection of the supplemental report, determine if it contains any statements falling under La. Code Crim. P. art 716 and disclose the substance of these statements to relators"). This Court should exercise it concstitutional obligation to go further. Such an approach has only limited utility "[b]ecause only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense." Jenks v. United States, 353 U.S. 657, 668-669, 77 S. Ct. 1007, 1013-1014, 1 L. Ed. 2d 1103 (1957) (defefndant entitled to production of witness statements contained in FBI reports). Indeed, at this point neither the Court nor the prosecution are aware what the defense will be.

35. The better approach is to allow the defense to examine the files:

> The Court now declares that as a matter of good practice and sound judgment in the trial of criminal cases, prosecuting

> attorneys should make available to attorneys for the defendants all such material in their files and let the defense attorneys determine whether or not it is useful in the defense of the case.

Hentz v. State, 489 So. 2d 1386, 1388 (Miss. 1986) (citing cases).

36. These considerations aside, the defense should be able to access these statements so that he may avoid the predictable surprises that will befall him when the prosecution witnesses testify. This is the very reason a majority of jurisdictions, including the federal government, provide that all statements of the prosecutions witnesses must be produced to a criminal defendant no later than the conclusion of their direct examinations. See generally, C.P. Jhong, Annotation, *Right of the Defendant in Criminal Case to Inspection of Statement of Prosecutions' Witness For Purposes of Cross-Examination or Impeachment*, 7 A.L.R.3d 181, 190-198. Where, particularly in a capital case, defense counsel if under an obligation to prepare well prior to trial, the statements should be disclosed at once.

37. This Court has clear authority to order production of witness statements in this capital case to insure that Mr. SMITH's due process rights are protected. The Supreme Court has held that a defendant's right to present a defense may trump the state's interest in technical compliance with the discovery articles. State v. Walters, 408 So. 2d 1337 (La. 1982), upheld a trial court's order directing the prosecution to provide the defense with names and addresses of witnesses. *"[T]here is authority in the trial judge under the due process clauses of the*

federal and state constitutions to order pre-trial discovery where he considers that fundamental fairness requires it . . ." Id. at 1338 (emphasis added). The court refused to adopt a strict interpretation of Article 723 of the Code of Criminal Procedure, observing that while the article does not authorize the discovery of statements made by witnesses, "[it] does not *prohibit* the discovery of the names and/or addresses of state witnesses, or *even for that matter the discovery of statements made by state witnesses.*" Id. at 1339. (first emphasis in original, second emphasis added).

38. All witness *statements* must be produced, including transcripts of grand jury proceedings. At a minimum, this Court must review the grand jury transcripts to determine whether exculpatory evidence is being suppressed. State v. Peters, 406 So. 2d 189, 191 (La. 1981 (Lemmon, J., concurring).

39. In sum, the following classes of witness statements must be produced for defense inspection:

> (a) All state-conducted interviews comprise prior statements which should be disclosed during discovery. Mr. SMITH demands copies of any statement made by any witness, and demands that the State turn over notes or records of any interview with any witness and reconstruct the contents of any interview for which there are no physical records.
>
> (b) These statements include, but are not limited to, prior testimony, either under oath or not under oath, such as statements to law enforcement agents, testimony before the

Grand Jury, and testimony in court in this case or any other case.

(c) Since the witness' predilection for assisting the prosecution is obviously a source of bias, this should include any testimony given in any other case on behalf of the state, or on behalf of any other party from whom the witness may reasonably have expected some form of compensation (monetary or otherwise).

(d) Copies of all written and/or oral statements referred to in the paragraphs above in this section, including memoranda, summaries or recordings of such statements, as well as grand jury testimony.

(e) All memoranda, documents and reports to, from and between law enforcement officers connected with the subject matter of this case.

(f) All memoranda, documents and reports to, from and between the investigative staff of the prosecution, excluding those portions if any, which contain the opinions, theories or conclusions of the prosecuting attorney or members of his legal staff.

* * * * *

M. Information Concerning Other Suspects.

46. Mr. SMITH demands various information concerning other suspects.

47. This should include any reasons that may have led law enforcement officers to suspect others of the crimes charged in this case, as well as information that could lead any person to suspect that Mr. SMITH played a lesser role, or that

someone else played a greater role, than the state will intimate at trial. Mr. SMITH specifically requests all information tending to suggest that his co-defendant is more culpable than he is.

* * * * *

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS, SECTION "D"

No. 378-102

STATE OF LOUISIANA

v.

JUAN SMITH

October 16, 1995

ANSWERS TO MOTION FOR DISCOVERY OF INFORMATION
NECESSARY TO A FAIR TRIAL

NOW INTO COURT, comes the State of Louisiana, through the undersigned Assistant District Attorney for the Paris of Orleans, and in answer to defendant's motion states:

1. The State recognizes its duty to reveal all such evidence in its possession. No exculpatory or favorable evidence is available to the State at the present time but will be revealed upon discovery.

2. The defendant will be presented with all discovery required by law.

3-9. See # 2 above.

10-13. See # 1 above.

14. No deal has been made with anyone at the present time. However, if this changes, amended answer will be filed immediately.

15. See # 14 above.

16-17. See #1 above.

18-19. See # 2 above.

20. (a) Not entitled.

(iv) The criminal "rap sheet" of any potential witness will be revealed timely.

(b)-(f) See # 1 above.

21. No written or recorded statements were made. Any statements made to non-police personnel will be revealed timely in accordance with the law.

22-24. See # 21 above.

25. See attached.

26. All relevant copies have been previously given to defense counsel and are also attached to the pleading.

27. See attached.

28. The State does not at this time intend to introduce such evidence.

29-30. See attached.

31. Initial police report is attached. Defense is not entitled to witness statements.

32-33. See # 31 above.

34. If so ordered, the State will reveal its entire file to the trial court for an in camera inspection.

35. The defense is not entitled to inspect entire D.A. file prior to trial.

36-38. See # 31 above.

39. (a)-(d) See # 31 above

(e) The defense is not entitled to such evidence

(f) See # 39(e) above.

40. (a) The State is not in possession of any such evidence.

(b) See # 40(a) above.

(c) The State is not obligated to furnish such evidence. This would be a matter of public record easily accessible to defense counsel.

(d) The defense is not entitled to such evidence.

(e) See #40(d) above

(f) See # 40 (d) above

(g) See # 40(c) and (d) above

(h)-(i) See # 40 (d) above

41. The State is not entitled to such information.

42-49. See # 41 above.

50. See attached rap.

WHEREFOR, the State prays that its answers be deemed good and sufficient in law and it be deemed from further answering.

Fred Menner
ASSISTANT DISTRICT ATTORNEY

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

Testimony taken during the Motion Hearing in the above referenced matter, as heard before the Honorable Frank A. Marullo, Jr., Judge presiding under the date of October 27, 1995

Appearances:

Mr. Roger Jordan, Esq.	**Assistant District Attorney**
Mr. Fred Menner, Esq.	**Assistant District Attorney**
Mr. Frank Larre, Esq.	**Counsel For Deft. Smith**

Mr. Rick Teissier, Esq.	Counsel for Deft. Bannister
Mr. Lane Trippe, Esq.	Co-counsel for Bannister
Mr. Walter Crittenden, Esq.	Counsel for Deft. Trackling
Mr. Robert Jenkins, Esq.	Counsel for Deft., Phillips

* * * * *

[11]

Note my exception.

Q Did you ever present MR. Smith to him in a physical lineup?

A No, sir.

Q Did you ever present these sets of photographs to anyone other than Mr. Boatner?

A Those three (3)?

Q Yeah.

A Yes, sir.

Q And, were they able to identify anyone?

A No.

Q And, these people that you presented them to, were they present at the time of this alleged murder?

A Yes.

Q And, they saw the perpetrators?

BY MR. JORDAN:

I'm going to object, Your Honor, whether they saw the perpetrator or not. They were shown

identification, they're entitled to that. I think that would be a question —

BY THE COURT:

Well, I think that borders on Brady material. I think he's entitled to have that.

BY MR. JORDAN:

Yes, sir. I withdraw the objection.

BY MR. LARRE:

Q These people who you saw, showed these pictures to, who did not identify Mr. Smith, they were able to visually see the perpetrators of the alleged murder?

A They saw one perpetrator, who's face was covered with a handkerchief.

Q Now, when Mr. Boatner saw the perpetrators, were their faces covered with a handkerchief?

A No.

[12]

BY MR. JORDAN:

Objection, relevancy, Your Honor.

BY MR. LARRE:

Q He saw nobody covered with a handkerchief?

BY MR. JORDAN:

Your Honor, my only objection is whether it's Juan Smith or not, I think other perpetrators and who else was in the house goes beyond the indentification procedure and opportunity to view this defendant.

BY THE COURT:

I think he is correct, Mr. Larre.

BY MR. LARRE:

Note my exception.

BY MR. LARRE:

So, it's your testimony that when he observed Juan Smith, or the person that he picked out in these pictures, that person did not have his face covered in any way?

That's correct. Yes, sir.

Q Now, you say that Mr. Boatner identified Mr. Smith. What did he, or who did he identify him as being? The person that struck him, or did he identify him as being a person that did other things, such as shooting someone?

BY MR. JORDAN:

Same question, same objection.

BY THE COURT:

Objection sustained.

BY MR. LARRE:

Your Honor —

BY THE COURT:

It's a question, Mr. Larre, as to the identification procedure. Those issues are more readily for the Trial. This is a question of whether or not this thing was tainted, suggestive, and I'm not giving you that information.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

Transcript of the Trial in the above referenced matter, as heard before the Honorable Frank A. Marullo, Jr., Judge presiding under the date of December 4, 1995

APPEARANCES:

FOR THE STATE:

Roger Jordan, Esquire
Fred Menner, Esquire
ASSISTANT DISTRICT ATTORNEYS

FOR THE DEFENSE:

Frank A. Larre, Esquire
Robert Jenkins, Esquire (Assisting)

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[11]

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THE FOLLOWING IN CAMERA PROCEDURE TOOK PLACE, WHEREUPON THE COURT REOPENED THE MOTION TO SUPPRESS INDENTIFICATION.

MR. JORDAN:

Your Honor, this is Larry Boatner.

THE COURT:

Alright, Mr. Boatner, would you raise your right hand. Do you swear the testimony you're about to give is the truth, nothing but the truth, so help you God?

MR. BOATNER:

Yes, I do.

THE COURT:

Alright, Counselor.

[12]

MR. LARRE:

Your Honor, at this time, we're prepared to ask him some questions in reference to his identification.

EXAMINATION BY MR. LARRE:

Q Mr. Boatner, at the time that you testified the last time, under cross-examination or under direct examination, you never once mentioned

anything about seeing a newspaper article; did you?

A I didn't.

Q But, you had, in fact, seen that newspaper article; is that correct?

A Yes.

Q And, when had you seen that article?

A June the 7th.

Q You saw it on the 7th; or is that the day that the article was displayed in the newspaper?

A I seen it in the newspaper.

Q And, where were you when you saw it? Were you in the hospital?

A At my house.

Q At your house. And, what did you do when you saw that article?

A I looked at it and I seen Juan's picture in it and I threw it down on the bed and I left.

Q Did you recognize him?

A Yes, I did.

Q Did you call the police on the 7th?

A No, I didn't.

Q You had already seen 10 or 11 sets of photographs by then; hadn't you?

A No, I didn't.

[13]

Q How many sets — you'd seen some photographs by June 7th?

A Yes, I had.

Q You'd seen some in March —

MR. JORDAN:

Your Honor, I'm going to object to this part of the examination.

THE COURT:

Objection sustained. He's indicated in the record that he's seen some to the pictures. The essential reason for the reopening of the motion to suppress was to ask the question in regard to what he saw in the newspaper and how that affected this witness.

MR. LARRE:

Q And, when you read that newspaper — when you saw that newspaper, did you read the entire article?

A No, I didn't read it.

Q You did not read the article?

A No, sir.

Q You just — what did you do?

A I looked at the picture, 'cause I had got a phone call from my friend saying they had caught the guys that had killed the football player's people and, they was saying that the guys might have had something to with it. So I looked at it and I said "That's one of them right there."

Q Now, your friend told you to look at this particular paper where you saw this — is this the article that you looked at?

A Yes.

[14]

Q That is?

A Yes.

Q So you looked at that article because your friend told you to look at it?

A He said they had caught some guys that might had had something to do with my friends that got killed on March 1st.

Q And, you got this newspaper, you —

A I went to the store and bought the newspaper.

Q And, did you read this part here?

A I ain't read any of it.

Q When did you let the police know that you recognized someone in that newspaper article?

A It wasn't until I was in the hospital and the Detective came and showed me some more pictures and I I.D.'d Juan Smith.

Q And, at no time did you contact the Detective and say 'I know who did it. I saw his picture in the newspaper?'

A No, I didn't.

Q And, when you looked at the pictures that the Detective showed you, you were picking out the person that you saw in the newspaper?

A I was picking out the person that I seen in that house.

Q And, when you looked at the newspaper, did you see Mr. Smith's name in the newspaper; is that how you know his name?

A No. My friend told me the name.

Q Your friend told you the name?

A He said Juan.

Q Juan. And, this friend that told you, is that [15] the one that told you to look in the newspaper?

A Yes.

Q And, what exactly did this friend tell you?

A He said to look at the newspaper. And, I looked at it and I seen Juan's picture. The first time, I wasn't on the phone with him. I called him back.

Q So when did he tell you to look for Juan?

A He didn't say to look for Juan. He said to look at the newspaper.

Q Well, when did he tell you Mr. Smith's name was Juan?

MR. JORDAN:

I'm going to object, your Honor.

THE COURT:

I'm going to let him answer that question.

THE WITNESS:

After I seen the picture and I was on the phone with him a few minute after.

BY MR. LARRE:

Q A few minutes after. And, how did he tell you that was Juan?

MR. JORDAN:

I'm going to object, your Honor. I think it's irrelevant.

MR. LARRE:

It's not irrelevant at all, your Honor. In pretrial motions, he calls this witness by name. And, in pretrial motions, he also —

THE COURT:

Repeat your question.

[16]

BY MR. LARRE:

Q The question was, a few days later, how did your friend call the name Juan; what sort of way?

A I told him which one it was in the newspaper, the third one in the picture.

Q You told him the third one. And, did you have the picture in front of you when you told him that?

A No, I didn't.

Q You remembered that?

A Yes, I did.

Q And, how long did you look at that picture before you made that decision?

MR. JORDAN:

I'm going to object, your Honor. This was no police procedure.

MR. LARRE:

No, your Honor. The criteria says the length of time that he looked at it.

THE COURT:

Well, let's — how long did you look at it?

THE WITNESS:

Ten minutes.

THE COURT:

Any other questions, Mr. Larre?

MR. LARRE:

Well, I know they're going to object, so I'm going to lay the predicate. According to the case we've been reading, it's relevant to determine the length of time —

THE COURT:

[17]

He's already answered that question.

MR. LARRE:

The length of time that he observed the person — observed him on the night of the incident.

MR. JORDAN:

I'm going to object to that. That's already been asked your Honor. It's been asked during the motion to suppress.

MR. LARRE:

It was objected to and it was sustained. It's never been answered.

MR. JORDAN:

Your Honor, this hearing was for the determination of whether or not there was any sort of police procedure or what sort of tainting the photographs in the newspaper had. Anything beyond that is beyond the scope of this hearing.

THE COURT:

Wait a minute. I don't think it says that, Mr. Larre. It says the time that he viewed this, forty minutes went by. How is that related to what you're making this out to be?

MR. LARRE:

That's the relevant part of this case, is how long he observed the person; opportunity to view. They have another case here that —

THE COURT:

Show me that. Show me. Put the hands in it.

[18]

MR. LARRE:

Number 1; "How long was the opportunity to view." "About two minutes." That's the heart of the —

THE COURT:

Okay. Answer the question. Rephrase your question.

BY MR. LARRE:

Q At the time that the shooting took place, how long did you have to observe the person that hit you with the gun?

A I don't know.

THE COURT:

This is a Fourth Circuit Court of Appeals case and —

MR. JORDAN:

I'm going to object to the question and —

MR. LARRE:

It was upheld by the Supreme Court.

THE COURT:

Where's the Supreme Court case?

MR. JORDAN:

My objection, your Honor, in addition, is this goes beyond the scope of this hearing. This hearing was to determine —

THE COURT:

Wait a minute, I'll make that determination.

***THE COURT READS CASE LAW. ***

THE COURT:

Alright. Answer the question.

[19]

BY MR. LARRE:

Q The time that you got hit in the head, how long did you have to observe the person who hit you?

A Quite a few times.

Q Quite a few times. Explain that?

MR. JORDAN:

I'm going to object.

THE COURT:

Objection sustained.

MR. LARRE:

First —

THE COURT:

I sustained the objection.

BY MR. LARRE:

Q You opened the door; is that correct?

A Yes, sir.

MR. JORDAN:

Your Honor, now, I'm going to object. This is definitely going beyond the scope of this hearing. This is going way back to the motion —

MR. LARRE:

I asked him how long he looked at the person's face —

THE COURT:

He said quite a few times. I'm going to say that's sufficient. Make your objection for the record. I'm ready to rule.

MR. LARRE:

I'm finished. Your Honor, the cases that we've presented to this Court says there's a five-step criteria. First off, it says that [20] once we've determined that he's viewed something that was suggestive, which this newspaper article, and we'll

mark it as Defense Exhibit 1, is very suggestive because on the second page of it, it says "These are the suspects in the North Roman Street killings." He indicates that a person called him up and said that the suspects of the North Roman Street killing", and his words, "The people who killed his friends were in the newspaper."

THE COURT:

That is not the testimony that I heard.

MR. LARRE:

That's the gist of it.

THE COURT:

No, that's not the gist of it. It doesn't even report to be that.

MR. LARRE:

That's my version of it.

THE COURT:

Your version. We're going to take is what's on that recorder.

MR. LARRE:

He indicates that someone has called him and suggested to him to look at the newspaper, that it could possibly be the person who was involved in the killing of his friends. He looks at the person and he says the number three person and his name is Juan. He indicates at some point in time his friend said Juan. He indicates —

[21]

THE COURT:

But, his friend said Juan after he made the identification and the name of Juan is on the picture. At the time he made the identification, according to the testimony, there's no names given by the friend. He told him to look at the newspaper.

MR. LARRE:

But, of course, we don't have the friend available. We don't know the name of the friend. However, according to the case law, we have a right to delve into five various areas; whether or not the possibility of a taint took place. There's a possibility that a taint took place, because he looked at pictures.

THE COURT:

I've already decided that and you have it in the record.

MR. LARRE:

And, we have a right to determine the length of time, observation and the circumstances of the observation.

THE COURT:

And, his answer to that is that he saw him several times.

MR. LARRE:

It doesn't allow me to go into the circumstances —

THE COURT:

Let's move on.

MR. LARRE:

[22] — or, the quality of the viewing. We have a right to determine the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation. And, we are not being allowed to delve into those areas.

THE COURT:

Any comment?

MR. JORDAN:

Yes, sir. We had a motion to suppress the identification previously with regards to the five factors I believe Defense Counsel might be quoting, Breakwaite (phonetically), I'm not sure if that's the case he's looking at or not. With regards to suggestibility, talk about police suggestibility, there's no police suggestibility here. Rather, this was an independent identification, a four picture lineup rather than a six picture lineup, by the witness, no suggestibility by the police at all.

THE COURT:

No government action.

MR. JORDAN:

No government action. And, in fact, I think this is more an issue to maybe weigh the identification to the jury.

MR. LARRE:

[23]

Your Honor, just in response, we're not talking about the Breakwaite (phonetically). We're talking about Supreme Court of Louisiana decision made November 30th of 1994, where the Supreme Court Justice says the totality of the circumstances established that single photograph —

THE COURT:

Single photograph. This is not a single photograph. There are four photographs, Mr. Larre.

MR. LARRE:

In the —

THE COURT:

In that case, that's a single photograph, Mr. Larre?

MR. LARRE:

Yes, sir. But, it outlines the criteria that —

THE COURT:

They've got four photographs together.

MR. LARRE:

What I'm objecting to at this point, is the ability to delve into the five enumerated things. This has nothing to do with —

THE COURT:

Well, you've asked him about the opportunity to see this person at the scene. He said he seen him several times.

MR. LARRE:

That's not sufficient.

[24]

THE COURT:

Well, I'll say it's sufficient.

MR. LARRE:

Note my exception to the Court's ruling.

THE COURT:

Okay. They asked him about viewing — how long it took him to view the newspaper. He answered that question.

MR. LARRE:

It took ten minutes.

THE COURT:

And, you're talking about a case with one photograph. We've got four in this newspaper.

MR. LARRE:

I have other cases. I've professed my argument, your Honor.

THE COURT:

Counselor, I deny the motion to suppress the identification and we will go back into the trial.

MR. LARRE:

We'll ask for a mistrial.

THE COURT:

Deny the mistrial.

MR. JORDAN:

Your Honor, perhaps we can get instruction by the Court. We do have a newspaper article, at the

top of the article where the four pictures were, what criteria —

THE COURT:

[25]

I won't let the newspaper article in. I'll let the pictures that were shown in the newspaper in.

MR. JORDAN:

Should I cut those off —

MR. LARRE:

We'll suggest that if you're going to allow a part of the document in, they have to see the whole document. It's unfair to us to say that they can't read what this suggestively says about the identification. It says specifically in this article whether he says —

THE COURT:

You want it in? If you want it in —

MR. LARRE:

I want the portion of the document —

MR. MENNER:

Portion?

MR. JORDAN:

Oh, no. A portion?

MR. LARRE:

No, we can't let the Tangie Thompson in, but we have one part that deals with this crime; that alleges that these are the perpetrators of this crime.

MR. JORDAN:

Judge, I'll rest on Mr. Larre's argument. If you let a piece of it in, you let the whole thing in. You're not talking about pieces —

MR. LARRE:

[26]

Then, let's do away with the severance and try the Tangie Thompson murder now, too, like they originally wanted to do.

THE COURT:

I'm letting the photographs in only.

MR. LARRE:

What about this section? Just look at it.

THE COURT:

I'm letting the photographs in only.

MR. LARRE:

We'd offer this as a proffer for the appellate court.

THE COURT:

If you want to put it in, you put it in on your case.

MR. LARRE:

I want to put in everything in that page that —

THE COURT:

Well, you have a case to present, but I'm not letting the State put it in. They are going to put only the pictures in. But, you have an opportunity to do it in the development of your case. We'll get to that crossroad then.

MR. LARRE:

I want —

THE COURT:

We'll get to that crossroad when you present your case, but I'm not allowing the State to do nothing more than to show the [27] four pictures that were in there. But, you, in the development of your case, when it comes your turn, you can do that if you want, we'll talk about it then. But, they're not going to put it in.

MR. LARRE:

Note my exception to the Court's ruling. And, I again, ask for a mistrial on that basis.

THE COURT:

Denied. The mistrial is denied. Let's go outside and finish this case.

THE COURT:

All right, Mr. Menner, let's finish your opening argument up.

(OPENING STATEMENTS FOR THE STATE CONTINUED THROUGH MR. MENNER, DURING WHICH ANOTHER OBJECTION WAS MADE BY THE DEFENSE.)

MR. MENNER:

Now, I told you there was two ways I was going to tell you we know that this is Juan Smith. One, is, of course, Larry. He saw Juan. And, of, course, remember, Rebe and Reggie didn't see anybody, so they can't identify anybody, 'cause they were in the

back. And, of course, everyone else who saw Juan Smith is no longer here. They're all dead.

MR. LARRE:

[28]

Objection. That's an improper statement.

THE COURT:

Objection overruled.

MR . MENNER:

Thank you, your Honor.

* * * * *

TESTIMONY OF P/O JOSEPH NARCISSE

[33]

Q On March 1st of 1995, what watch were you working?

A The second watch.

Q And, what hours is the second watch?

A From 3:00 to 11:00.

Q And, at that time, during the second watch, were you in uniform?

A Yes, I was.

Q Was your partner?

A Yes.

Q In a police unit?

A Marked police vehicle.

Q At any time during that evening, did you receive a call of a shooting on North Roman street?

A Yes, I did.

Q About what time did you receive that call?

A Exactly at 8:33 p.m.

Q Where were you when you received this call?

A I was just about in the 2000 block of Galvez.

Q About how far is that from the location where the shooting you later discovered occurred?

A Approximately four or five blocks.

Q What did you do at that point?

A We were dispatched to the 2200 block of North Roman to handle a report of gunshots being fired in the area. So we went to that call, went to the area. As we were in route, the dispatcher came — she called us [34] again and told us she had further information that someone had called from 2230 North Roman and that it wasn't just regular gunshots anymore, that an aggravated burglary had taken place inside of 2230 North Roman.

Q Now, an aggravated burglary; what does that code mean?

A An aggravated burglary, that it's a burglary, someone entered the house, you know, unwelcomed, and was armed or had committed a battery, therein.

Q What did you do at that point, Officer?

A Pardon me?

Q What did you do at that point?

A We continued on to the location. Once we got to the intersection of Elysian Fields and North Roman, which is a half a block away from the house, there were people at the intersection, pointing to us, down to the house, where to go.

Q And, what happened next?

A We arrived in front the location, the witness, Ms. Espadron, she flagged us down. She had a cordless phone in her hand that she had made the phone call from. She flagged us down.

Q Is that Rebe Espadron?

A Yes, sir.

Q What was her emotional state when you saw her?

A Very, very, terribly hysterical.

Q And, where was she when she flagged you down?

A She was outside on the sidewalk.

Q Of the residence at 2230 North Roman?

A Yes.

Q What did you and your partner do at that [35] point?

A She let us inside, inside the house, where we found five people lying inside, all of them in a pool of blood. There were three victims in the first room that we were led to. The entrance to the house is the kitchen.

Q Would you describe the house for the jury and indicate where you found the victims?

A Sure. It's not a very big house. It's a small house. There's a — the first room that we entered is actually the kitchen. It's kind of a large kitchen. Then, next to it is a living room and then, back past the living room is another bedroom or a den, another bedroom and a small bathroom. So, the room that we entered through was actually the kitchen. In that kitchen, there were two — correction; three people lying on the floor that had been shot. In the second room off to the left, just adjacent to that room, were two other people that had been shot.

Q Now, as a incident scene officer, the first officer on the scene, what are your duties?

A Well, on a scene like that, of a shooting, well, first, our first job is to preserve life. So, as soon as we walked through the house and saw all the people shot, we immediately summoned EMS.

Q What's the next thing you did at that point?

A Then, we tried to assess everyone's condition, to see who's conscious, who's able to talk to us. So you know, we try and preserve any witnesses or any evidence that might be there on the scene.

Q In that kitchen area, were you able to determine any of the individuals, the victims, were [36] still responsive?

A Yes, we did. We talked to one of the victims. One lady, her name was Shelita Russell, she was conscious at the time. She wasn't — she was able to provide us with her name, date of birth, personal information, things like that, but she was not able to give us any information or any

details of what had happened. She had been shot in the hand, the leg and the abdominal area.

Q Was she in bad condition at that point?

A Yes, sir. She was in bad condition, but she was conscious and able to talk to us.

Q What about the two other individuals, two other victims that you found in the kitchen area?

A The other two victims that were lying in the kitchen, they were unconscious and showed no signs of life.

Q Now, leading into the second room, the living room, what did you find in that room?

A We found two victims, two individuals lying in the living room, one half way on top of another. We found that, in interviewing Ms. Espadron, that one of the individuals lying in that living room, that she didn't know. That, that person was not one of her guests and she did not know him at all?

Q Was that Phillip Young?

A Yes, it was.

Q Now, you stated there were two individuals. Was the other individual Robert Simons?

A Yes, it was.

Q How did you find these individuals in the room, if you could relate that to the jury?

[37]

A Phillip Young was lying face-down and the other victim, Robert, was lying half way on top. He was lying on his left arm. So his left arm wasn't

—we couldn't see his left arm. So we were concentrating on — that victim, Phillip Young was not a guest in the house, and who Ms. Espadron had told us, I don't know, you know, she didn't know who he was or why he was there. So we were watching him very closely. He was conscious at the time. He wasn't able to get up or anything like that, but, he had been shot and he was conscious. Was not able to talk to us, however, but was conscious.

Q What did you do at that point?

A At that time, we continued to interview Ms. Espadron and we checked the rest of the residence, where we found Mr. Larry Boatner, who was in the bathroom of the residence. Mr. Boatner was a guest of the house. He had let inside the perpetrators and did see them. So he was struck in the back of the head with, evidentially, a pistol that the perpetrators were carrying. So he was in the bathroom, taking care of his wound to the back of his head.

Q What was his physical condition?

A He had not been shot. He just had a severe laceration to the back of his head and he was quite hysterical as well.

Q Now, going back to the living room, the two individuals on the floor, Phillip Young and Mr. Robert Simons, did Phillip Young have anything in his hands, or did Robert Simons have anything in his hands at that time?

A Not long after we arrived, EMS arrived on the [38] scene and began, you know, rendering

assistance to the victims there in the house. While there, we kept a close eye on this individual, Phillip Young, who had no business there in the house and who had came in with the rest of the perpetrators. While watching him, EMS rolled Robert Simons off to the side to get to Phillip Young, cause Phillip Young was conscious.

Q Robert Simons was on top of —

A Yes. He was lying half way on top of him, the left side of his body.

Q He was on top of Phillip Young?

A Yes. So when EMS rolled Robert Simons off of Phillip Young, Phillip Young was clinching in his left hand, a small 25 caliber pistol.

Q How did he have it in his hand? Was it any particular grip?

A Yeah. The weapon was cocked. He was gripping it pretty tight; so tight that EMS had to pry his hands away from the gun.

Q Did you observe this?

A Yes, standing right there.

Q So Phillip Young had the weapon in a configuration as if he could have been firing the weapon?

A Absolutely.

Q And, you said —

MR. LARRE:

Oh, I didn't hear that question, I'm sorry. I didn't hear the question before he answered.

THE COURT:

Repeat your question for him.

[39]

BY MR. JORDAN:

Q Did Phillip Young have the weapon in his hand as though it was in a firing position in his hand?

A Yes, sir. It was cocked.

Q And, by cocked, what do you mean?

A The hammer was to the rear.

Q What did you do with the weapon at that time?

A At that time, we left the weapon on the scene and just corridored off the area so that — simply left it there, because we tried to preserve the scene, the integrity of the scene, as much as possible, although the victims, you know, — aid was paramount. But, we wanted to preserve the scene as much as we could, so we left the gun there on the scene so pictures could be taken of it and crime lab could come out and conduct their investigation.

Q Did you find any other victims outside the residence?

A Yes, we did. Checking the perimeter of the house, we found another victim lying on side the house in an alley. He was lying face-down and he was later pronounced dead.

Q Is that in the alleyway on side by the kitchen?

A Yes, right. Inside the yard on the alley. You couldn't see him from outside. There's a gate — a wooden fence, rather, in front the sidewalk. So

we had to walk around the house to actually look back there to find him.

Q Knowing that there were homicide victims or possible homicide victims, what is the next thing you did in your investigation?

[40]

A. Once EMS — there was a doctor on the scene. Once they pronounced the victims, that someone — an actual murder had occurred, we requested Homicide to come out to conduct their investigation. Once it becomes a homicide, it's Homicide's investigation.

Q Is that first-hand police procedure?

A. Yes.

Q Officer I'm going to show you State's 1; could you describe what that is, sir?

A. That's a picture taken from the living room inside the house there on North Roman. In the picture is a picture of Robert Simon's lifeless body. And, the way the body is contoured, you can see that he was simply rolled over, you know, pushed off, rolled off of Phillip Young's body.

Q State's 2?

A The same living room, different angle, Robert Simon's lifeless body there in a pool of blood.

Q And, State's 3?

A This is a picture of the same scene, with a close-up of the gun that was taken from Phillip

Young's hand, lying there in the coagulated blood.

Q Officer, now I'm going to show you what I'm marking as State's Exhibit number 4 and ask you to identify this exhibit. I'm going to show you State's 4; can you identify this, sir?

A Yes, sir. This is apparently the same weapon that was there on the scene on Roman. The same weapon that was there on the scene, on Roman, the same weapon that was inside of Phillip Young's hand.

Q There's also another object on top of that gun. What would that be?

[41]

A That's the magazine that was removed, that was inside the weapon.

Q You say the gun was in a cocked position. Were there any live rounds in the gun?

A Yes, there was live rounds inside of the weapon, in the chamber of the gun.

THE COURT:

Pass it up.

BY MR. JORDAN:

Q Now, Officer, you indicated before, you're familiar with the scene and the configuration of the house as it was on that evening, March 1st, 1995?

A Yes.

Q Earlier, did you also have the occasion to view some scene diagrams?

A Yes, I did.

Q I'm going to show you, with the Court's permission, State's Exhibit number 5. I'll ask, with the Court's permission, could you step down and identify this exhibit?

MR. LARRE:

Your Honor, Just for the record, I've seen this diagram. I have no objection to it.

THE COURT:

Okay.

BY MR. JORDAN:

Q Officer, if you could indicate, what does this diagram represent?

A This is a diagram of the house on North Roman, 2230 North Roman.

Q Now, can you indicate where the kitchen in [42] this —

A The kitchen is here, the living room, a little foyer here. There's a little t.v. in there or something. Another bedroom, a den and a bathroom area where Mr. Boatner was in, attending to his wound.

Q Now, where is the front door?

A This would be the street here from North Roman. This would be the door that we entered through and the perpetrators entered.

Q Where is the back door of the kitchen?

A This is the back — this is also the alley where the other victim was found outside.

Q In this diagram, point to where the victim, Mr. Robert Simons was — I mean, Mr. Phillip Young?

A Right here in the doorway. Right here.

MR. JORDAN:

Let the record reflect, in the living room entrance way by the closet.

BY MR. JORDAN:

Q And, next, — Officer, can you also indicate on that diagram, where you found the other three bodies? That's the two that were unconscious and Shelita Russell.

A Sure. This is — there's a cabinet over here alongside of this wall over here and a cabinet over the sink. And, Shelita Russell, she was lying in this area. There was another victim, Ian —

MR. JORDAN:

Let the record reflect he's pointing by the closet in the kitchen.

THE WITNESS:

And, another victim was over here.

[43]

MR. JORDAN:

Let the record reflect by the back door of the kitchen.

BY MR. JORDAN:

Q Officer, what I'm going to show you next, is State's Exhibit number 6, and ask if you can identify this diagram?

MR. JORDAN:

For the record, your Honor, this has been shown to Defense Counsel as well.

THE WITNESS:

This is a drawing of just the living room — just the kitchen of the house there on North Roman.

BY MR. JORDAN:

Q Again, for directions, could you indicate where the front door of the kitchen would be?

A The front door, right here.

Q And, there are two figures of bodies at the kitchen. Would you point those out? Would those be the conscious or the unconscious victims?

A These are the two unconscious victims that were there in the kitchen.

Q And, where would the body of Shelita Russell have been?

A Here, where on the picture is the shell casings and bullets are, right here.

Q Now, according to that diagram, the circles and also the triangles, what do those represent?

A The circles represent empty casings, the casings that were found. The triangles are the actual bullets that were found.

[44]

Q There's also a body in the alleyway, is that the figure that —

A Right. Again, this is the alleyway alongside the house and that's a figure that represents the body outside the house in the alleyway.

Q Finally, Officer, I'm going to show you State's Exhibit 7 and ask you if you can identify this exhibit?

A That's a drawing of the living room

Q That would be the room adjacent to the kitchen?

A Yes, adjacent to the kitchen.

Q And, I see an outline of a figure of a body. Who does that represent?

A This represents the body of Mr. Robert Simons, going almost exactly how it was found when the crime lab came. The body was rolled over then, to tend to Phillip Young. That's his body. That would be the body.

Q And, there's also another little drawing underneath the body?

A That represents the body that was found in Mr. Phillip Young's hand.

Q And, again, the circles and the triangles in the photograph, what does that represent?

A Again, casings. The circles are casings that were found in the house and the triangles are actually bullets, projectiles that were found.

Q And, what is a casing, Officer?

A Casings are empty shells; a spent bullet, you know. The part that comes out and the part that's left.

[45]

Q That's ejected from the gun?

A Right.

Q Have a seat. Thank you, sir.

Officer, did you participate in any follow-up investigation in this —

A I did no follow-up in this case.

Q You were the scene officer?

A Yes, I was.

Q You turned your investigation over to the homicide detective?

A Yes, I did.

Q To John Ronquillo?

A Yes.

* * * * *

** CROSS EXAMINATION **

BY MR. LARRE:

Q The only person and the people that you spoke to on the scene was Ms. Rebe Espadron and Mr. Boatner; is that correct?

A Also, I was able to speak to Shelita Russell.

Q And, the extent of what you got from Ms. Russell, was her name and address and date of birth; is that correct?

A That is correct.

Q And, she was unable to tell you if she looked at the people or —

A She was unable to give any further details about the incident.

Q What about Ms. Rebe, did she tell you that one [46] of the perpetrators was wearing a bandanna on his face?

MR. JORDAN:

Your Honor, I'm going to object at this point, to hearsay. Rebe Espadron will be here to testify, as well as Larry Boatner.

MR. LARRE:

Your Honor, I —

THE COURT:

I'm going to permit it. Go ahead.

MR. LARRE:

Thank you.

THE WITNESS:

To my recollection, she did give some description of one of the assailants. She went on — her statement to me was, she didn't see the whole incident occur. She was only able to see one — I believe, only one person, one of the perpetrators.

BY MR. LARRE:

Q And, the perpetrator that she did see, was he wearing a covering on his face?

A I believe so.

Q And, did she give a description of that person, such as height, weight?

A She did not give any specifics about perpetrators to me. Again, as soon as it becomes a homicide, homicide detectives takes the information and they follow up on it. She briefly tells us what happened. Our report is simply, you know, a — just a summary of what we did, what we occurred. All the details of Ms. Espadron's statement would be in the Homicide's report.

[47] If — I do remember her saying something about a bandanna. I do not remember if it was covering his face or around his neck. I don't remember very much of that, because that part of it, the homicide detectives, they take charge of that and further the investigation.

Q But, she did speak to you before the homicide detectives came?

A Yes.

Q And, you didn't record whether she gave you an accurate description or any type of a description?

A Right. We don't — we won't put much of — the officers that come on the scene that handle the original call, we won't put very much in our report of the statement of the victims. We leave that for Homicide to do the follow-up. Because, you know, they're the homicide detectives. They're the ones who have all the time to do all the follow-up work. We simply don't have the time, that's why we have homicide.

Q Now, you observed Mr. Boatner in the bathroom; is that correct?

A Yes.

Q And, did he have what you considered, I believe you said, "A severe laceration;" was it?

A That's a fair statement, yes, to the back of his head.

Q Did he ever indicate to you, a description of the person that he saw?

A He, again, had a description of the perpetrators. Yes, he did.

Q And, how many perpetrators did he see?

A I cannot recall at this time.

[48]

MR. JORDAN:

Your Honor, I would object. This is hearsay. Larry Boatner is here to testify.

THE COURT:

I understand, but he's subject to cross-examination. I'm going to permit it.

BY MR. LARRE:

Q Did you review your report today?

A Yes, I did.

Q And, in that report, when you reviewed it today, did you note any description that Mr. Boatner may have given you?

A No, I did not.

Q And, you don't recall whether he said the person was tall or short, or how many people he saw?

A No, sir, I do not.

* * * * *

TESTIMONY OF DR. ALVARO HUNT

[52]

BY MR. MENNER:

Q Dr. Hunt, did you perform an autopsy on Miss Shelita Russell on March 11th, 1995?

A I did.

Q And, did you prepare a report as a result of that autopsy?

A I did.

Q I'm going to show you what I've marked previously as State' s Exhibit 8, and copies have been previously tendered to Defense Counsel. Is this a copy of your report?

A Yes, sir. It is.

[53]

Q And, would you please explain to the jury, the findings of this autopsy?

A It was my finding that Miss Russell died as a result of a number of gunshot wounds which were inflicted some eight to nine days prior to the time of the autopsy.

Q And, how many times was she shot?

A The autopsy definitely indicated that she was shot six times. There was one additional wound

on the body, which at the time of the autopsy, could not be identified as a gunshot wound

Q Why is that?

A Because it was a very large wound which the surgeons at the hospital had opened up and packed with gauze, and I could not identify either an entrance or an exit wound in that particular lesion.

Q So there are at least six identifiable wounds and one additional one that may or may not have been a gunshot wound?

A That's correct.

Q Because of the post-operative treatment?

A That's correct.

Q Now, Doctor, would you explain to the jury, indicate on your own body, where Shelita was shot?

A Yes. The first of these, not necessarily in order in which she was shot, but the first that I will describe to you is what we call a through-and-through gunshot wound, which entered the left upper arm about three inches above the elbow. It entered on the lateral, or the outside aspect of the arm and came out along the inside surface of the arm. The second was just below the elbow, which was very similar to the [54] first one, in that it went in on the outside aspect of the elbow, came out on the inside aspect of the elbow. The third was a wound through her first finger, or index finger, in this particular area, which the orthopedic surgeons had wired back together with wire, because the bone itself was

broken. The fourth was a similar wound which was on the second finger of the left hand, in this particular area right here, which was only a superficial tearing wound. The next wound was a through-and-through wound, which went through the right leg, from inner aspect to outer aspect of the leg, just above the ankle.

The wound that we could not definitely identify as a gunshot wound, was on her thigh; the anterior aspect of her thigh. And, at the time of the autopsy, was a very large gaping wound which was packed with gauze. I could not identify either the exit or the entrance gunshot wound. The final wound, which was the fatal wound in Miss Russell, was a gunshot wound of the left back. It was about four inches to the left of her backbone, just above her pelvic bone.

Q Were these wounds consistent with a person that had been lying face-down and shot from someone above as she laid face-down on the floor?

A That could be, yes, sir.

Q Now, Doctor, you said that you performed enumerable autopsies; correct? You had — is that correct, Doctor?

A Well, many, yes, sir.

Q And, many of those involved gunshot wounds?

A Some of them, yes, sir.

Q And, in your expertise, what type of gun would [55] you say caused these wounds?

A Well, the wounds were one week old when I saw them, so they were all in a healing state. But, I would say that these were caused by a gun which could have been of 32 caliber, 38 caliber, 7 millimeter, 9 millimeter, something in a midsize range, as opposed to a very small weapon like a 22. Or the large gaping wounds, then we associate it with some of the automatic weapons.

Q So these wounds are consistent with gunshots from a 9 millimeter handgun; correct?

A They could be, yes, sir.

Q You testified that the cause of her death were these gunshot wounds, even though she died eight days later?

A Yes, sir.

Q But for these wounds, would Shelita have died on the 10th of March?

A Not unless she died of some other cause.

Q And, was she otherwise healthy?

A Yes, she was a healthy young woman.

MR. MENNER:

Nothing further, your Honor. I tender.

THE COURT:

Tender back to the Defense.

CROSS EXAMINATION

BY MR. LARRE:

Q Doctor, when you say these wounds could be from a 9 Millimeter, you can't say that with any degree of certainty?

A No, sir. As I indicated, it's my opinion, [56] it could have been from something, say in the range of 32 caliber, 38 caliber, 7 millimeter, 9 millimeter; something in what we would say would be the mid-range or the mid-size calibers of bullets.

Q And, all of these wounds have been treated by a physician in some manner. They had been debrided and cleaned and things of that nature. Well, one of them is the fatal wound that had been —

A That's correct. Only the wound of the back looked like, to me, that it was basically an uncleaned, a small wound, that, basically, it was left unmolested and it was in a healing phase.

Q And, was any surgery done to heal the damage or treat the damage that that bullet caused?

A Yes, sir.

Q And, that was not from where the entrance wound was? It was from the abdomen instead of the back?

A Well, the bullet entered in the back, but the damage it did was in the abdominal cavity itself.

Q And, where was the surgery done to heal it; from the front or the back?

A It was done from the front.

Q So that wound was left intact, but it was not — it had started to heal?

A Yes, sir.

Q So it could have been anyone of the sizes, and a 9 millimeter is just a guess?

A Yes, sir.

* * * * *

TESTIMONY OF DR. WILLIAM NEWMAN

[59]

BY MR. MENNER:

Q Now, Dr. Newman, on March the 3rd of 1995, did you perform the autopsy of four individuals?

A Yes, sir.

Q And, were those individuals Ian Jackson, Willie Leggett , Robert Simons and James Jackson?

A Yes.

Q Okay. I'd like to first start with Ian Jackson. And, when you performed this autopsy, did you [60] prepare a report?

A Yes.

Q Okay. I'm going to show you what I'm marking as State's Exhibit 9. A copy has been previously tendered to Defense Counsel. Do you recognize that report?

A Yes, this is my autopsy protocol.

Q Okay. Would you explain to the jury what the findings of that autopsy is? What was the cause of death?

A This individual had multiple gunshot wounds. I counted ten. He had two gunshot wounds to his chest and there was lung and cardiac injury. He

had a gunshot wound of his left arm. He had a gunshot wound of his right arm and he had multiple gunshot wounds to the legs. I attributed, basically, that he died because of his lung and heart injury, and those were the immediate reason he died.

Q Now, would you explain to the jury, pointing to your body, where those chest injuries were exactly? You stated the chest, but tell me where on his body were those injuries? Were they more to the side?

A They were around the anterior axillary line. The axillar, we divide it, from a clinical standpoint, anterior, middle and posterior axillar line. It's just basically a line of the armpit. And, so one of the wounds was one centimeter anterior, which means it was just a little bit in front of the armpit.

Q And, where did those bullets go into? What damage did it cause?

A The one was about eight or nine inches from the top of the shoulder and just a little bit past — [61] in front of the armpit. And, this one went into the left lung and then, also through the heart and then, I recovered the bullet over on the right side of the chest. So the bullet went in, this point, got the left lung, got the heart, and I got the bullet out of the right chest. The other was in the areolar line of the left chest. The areolar is the nipple. And, this bullet went into the chest and also injured the heart, into the lung. And, I recovered a fragment or bullet in

the pericardia sack, and the pericardia sack is the sack that surrounds the heart.

Q Now, what did you do with those bullets when you removed them from the bodies?

A When I get bullets, I place them in evidence envelopes. I identify it with a case number and I write my name and where I retrieve them from.

Q I'm going to show you what I'm marking as State's Exhibits 10, 11 and 12. Do you recognize these packets?

A These are from Leggett.

Q My apology. Well, I'm going to ask you this, Doctor. Let's talk a little bit about those wounds and what they caused.

A All right.

Q Could a person who sustained the injuries that Ian did, could have run several yards with those injuries after he was shot?

A There's always that possibility, because basically, depending on how fast the blood exits the heart and how much blood volume there actually is, so there's a possibility that someone could run for some distance.

[62]

Q Now, are those wounds consistent with someone who is running and being shot at the same time?

A Probably could be either. It's very difficult for us to actually say what is actually happening with the deceased individual, because basically, what we're looking at is a gunshot wound on the skin

and, then, we try to determine the path of that bullet. But, the exact position of the individual, what they were doing is not always clear. And, we're looking at it in relationship to the muzzle of the gun to the entry and exit wound.

Q But, certainly, the injuries he had sustained at that point to the chest, he could have run?

A That would be a possibility.

Q Now, let's talk about the injury to his leg. I know you had started to mention that he had been shot in the back of his leg?

A Right.

Q Would you explain to the jury exactly how he was injured there?

A He had two gunshot wounds to the right leg, from the right antral-medial, which means just a little bit in this area right here, just above the kneecap. He had one entry gunshot wound and then, there was another gunshot wound below the knee on the backside of the leg. And, that was on his right leg. And, then, on the left leg, there was one on the lateral aspect, which means on the side of the left leg. This was below the knee. And, then, on the posterolateral, which is a little bit toward the back and toward the side, below the knee, there was another gunshot wound. And, then, there were two additional gunshot wounds on [63] the back of the left upper leg.

Q And, those injuries caused substantial damage to his leg?

A He had a fair amount of muscle, and skin and tissue injury, yes.

Q And, do you think he could have really run much with those injuries, or would those have fallen him?

A I described on some of these gunshot wounds that there was tearing and destruction of tendons, and muscle and skin. So with those sorts of injuries, one wonders how much an individual could run.

Q So it would be unlikely that he would get very far at the —

A I would not thinks so, because of, basically, the muscles and the tendons, part of the legs had been destroyed, so that the muscle function would be altered and it would be very difficult to run.

Q Now, let me ask you if this scenario is possible, based on the injuries that you observed on Ian during the autopsy. Is it possible that he could have been shot in the chest, ran, was chased down with an assault-type weapon, shot in the leg and fell down at that point?

A Shot in the chest —

Q Runs a distance.

A — runs a distance.

Q Shot in the leg and falls.

A The injuries on his legs suggests that he was basically shot more-or-less from the rear. And, so he is first shot in the chest, on the lateral aspects of the chest and, then, one a little bit

more toward the [64] front of the chest; one toward the side and one toward the front. And, then, the rest of the injuries were all on the backside, and that would be plausible, or possible.

Q And, you said he couldn't run very far with the leg injuries?

A I would not think so, no.

Q Now, you stated that you removed several pellets and bullets from Ian's body?

A Right.

Q I'm going to show you what I'm marking now, as State's Exhibits 10, 11, 12, 13 through 18. I'm going to ask you if you recognize these documents?

A Yes. These are what I recovered from the deceased individual, labeled with the case number and his name and where I recovered them. Some of these are bullet jackets. In fact, most of this material is jackets; jacket or bullet fragments. Here is a bullet I recovered from the right chest.

Q Did you place those on the evidence books?

A Yes. These were all recorded, yes, sir.

Q And, those are your initials on there?

A Well, let me see. I described this one as a jacket fragment. And, I think — I don't see my initials on this one. I may have marked it, but sometimes, with just a little fragment, it's a little difficult to find a spot to put the initials so

that you don't interfere with the ballistics, if they want to do the rifling — look for the rifling.

Q Is that your initials on the envelope?

A Yes. Oh, yes. And, all the envelopes have been sealed with evidence tape, but then, when the [65] crime lab has opened them back up, they had resealed them and put their initials on them.

(A BRIEF PAUSE.)

THE COURT:

Any more questions, Mr. Menner?

MR. MENNER:

Your Honor, I do have one more question. I had to stop to finish opening up an envelope.

BY MR. MENNER:

Q Doctor, are these all the bullets and fragments that you recovered —

A One bullet and mostly fragments.

Q Now, one other question, Doctor. Did you run any tests to determine the level of alcohol or drugs in the system of Ian Jackson? Were any tests run?

A Right.

Q And, what was the result of those tests?

A His blood alcohol level was .14 — 0.14. We did not find — the laboratory did not find any Barbiturates or Benzodiazepines in his blood. And, there was evidence that he had cannabinoids, which was probably exposure to

marijuana. So the basic alcohol toxicological result, his blood alcohol level was 0.14 and then, there was evidence that he had exposure to marijuana.

Q Now, what does that level mean, if you can explain it to the jury?

A The legal level in Louisiana for being under the influence of alcohol is .1, so it tells us that this individual had had several drinks.

* * * * *

[76]

CROSS EXAMINATION

BY MR. LARRE:

Q Doctor, you've taken a lot of fragments and partial pieces of bullets out of various people. Were you able to determine the caliber of the bullet used in any of the wounds?

A No, sir. I'm not a ballistics expert and I'm really not comfortable calling the caliber of the bullet.

Q And, when you looked at the entry or exit wounds, were you able to determine the size of the bullet that made those wounds?

A That's very difficult, mainly because after the bullet enters the skin, depending on muscle contracture, whether the wound was stretched or that sort of thing. So it's a little hazardous.

Q Now, the District Attorney asked you for each individual, were these wounds consistent with somebody being shot as they were laying face-down and you said that they could be. But,

there's no way you can tell [77] with any certainty, how they were shot?

A We're really not witnesses at the scene, and all we can really do is make a judgement as to the basic position of the muzzle of a gun to the entry gunshot wound and then, try to — so that it would be a possibility, but, certainly there are other possibilities also.

Q You can't even say if it was a probability; can you?

A I can probably say, yes, that — well, it's a good possibility. Whether it's a probability, I guess I'm just hung up on terminology. I don't quite understand.

Q Well, would you feel more comfortable with going one-by-one in determining whether they were probably laid down before they were shot?

A I don't think I could really say yes, the individual was lying down when he was shot. All I can really say is that I can probably estimate the position of the muzzle of the gun and the gunshot wound. But, an individual basically, could be standing and — or, the bullet could make the same course, or they could be laying down and the bullet could make the same course.

Q And, it would all depend on many factors, like the height of the victim and the height of the person who shot him?

A Oh, yes, sir.

Q There are many, many factors?

A Yes.

* * * * *

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

Transcript of the Trial in the above referenced matter, as heard before the Honorable Frank A. Marullo, Jr., Judge presiding under the date of December 5, 1995

APPEARANCES:

FOR THE STATE:

Roger Jordan, Esquire
Fred Menner, Esquire
ASSISTANT DISTRICT ATTORNEYS

FOR THE DEFENSE:

Frank A. Larre, Esquire
Robert Jenkins, Esquire (Assisting)

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* * * * *

TESTIMONY OF REBE ESPADRON

[81]

* * * * *

DIRECT EXAMINATION

BY MR. JORDAN:

Q Good morning, Rebe.

A Good morning.

Q Please state your name for the record.

A Rebe Espadron.

Q And, how old are you, Rebe?

A Twenty-two.

Q From New Orleans?

A Yes.

Q And, where did you go to high school?

A Calhoun High school in Monroe, Louisiana.

Q Are you nervous right now?

A Yeah.

Q Do you have a sister name Shelita?

A Yes, I did.

Q And, how old was Shelita when she died?

A Seventeen.

Q Were you very close with her?

A Yes, I was.

Q And, what high school did Shelita go to?

[82]

A Nicholls High.

Q What did she like to do in particular with her free time?

A Sing, draw, all different kind of stuff.

Q Was she very good at singing?

A Yes.

Q Who is Robert Simon?

A My cousin.

Q How old was Robert when he was murdered?

A Twenty-four.

Q Were you very close with Robert?

A Yes.

Q What was your relationship like with Robert?

A Like a brother.

Q Did you all see each other often?

A Every day, 24/7.

Q Now, at one time you lived at 2230 North Roman Street. Is that right?

A Yes.

Q How long did you live there before this happened?

A About a year and a half.

Q Who did you live with?

A By myself, other than, you know, they'll come sleep over, or whatever.

Q Your friends, you're talking about?

A Yeah. And, Robert and Shelita was staying there, going to school from there.

Q Shelita was going to school at the time that she was killed?

A Yes, she was.

Q Now, I want to start out by asking you, before [83] this happened, the time proceeding this, were you ever involved in any sort of drug sales or anything of that nature?

A Yes, I was, off-and-on.

Q Did you do that with anyone else?

A No, I didn't.

Q Was Robert involved at all?

A Yes, he was.

Q And, how was that?

A Off-and-on.

Q You say "off-and-on," how much did you sell and what would you sell?

A Well, I sold pot, crack and — not that much, you know.

Q When you say "off-and-on," how often?

A Like, every other month, or just sometimes when I needed to pay a bill or something.

Q Now, I'm going to draw your attention to March 1st, 1995. It's Ash Wednesday, the day after Mardi Gras. Before I start, let me ask you this; you look really nervous right now. You also seem upset. Have you ever seen Juan Smith before?

A No.

Q I'm going to ask you to just calm down a little bit, okay. Put your hands in your lap. You don't have to look at him, okay.

MR. LARRE:

Your Honor, may I approach the bench?

THE COURT:

Yes.

(AT WHICH POINT AN OFF THE RECORD DISCUSSION TOOK PLACE AT THE SIDEBAR.)

[84]

BY MR. JORDAN:

Q Rebe, on March 1st, did any of your friends come over that evening?

A Yes, they did.

Q Who came over that evening?

A Robert, Larry, Shelita, Will, Ian, Jack.

Q Now, Ian and Jack — Ian Jackson and Jack Jackson — James Jackson, how did you know them?

A Good friends of the family. I been knowing them for a long time.

Q How old was Ian when he was murdered?

A I don't know.

Q Was he young, in his twenties?

A Yeah.

Q And, what about Jack; was he a little older than ya'll?

A Yeah. Jack was 45.

Q What time did they come over?

A Say about 6:30 or quarter to 7.

Q What time did Shelita come over that day?

A Her and Robert got there about 6:30. All of them came around the same time.

Q Now, you said Will was there. Is that Willie Leggett? Is that what you called Willie Leggett; Will?

A Yes.

Q How old was Will; do you remember?

A No, I don't.

Q Was he young, in his twenties, as well?

A Yes, he was.

Q How did you know Will?

A Good friend. Went to school with Robert.

[85]

Q How long had you known Will?

A For about — say about eight or nine years.

Q What time did he come over?

A About 6:30.

Q Now, was Robert's birthday sometime around that date?

A Yes, it was.

Q Why was everybody over there that evening?

A Because some of them didn't make it to his birthday party and they had came to see him. And, Ian was dropping Jack off. Jack had just got out the hospital.

Q Because of his broken leg?

A Yes.

Q Did anybody else come over that evening; Reginald Harbor?

A Yes, he did.

Q How do you know Reginald?

A Friend, through a friend.

Q What time did he come over?

A About 7.

Q Now, after Reginald came over, what did you do that evening? What part of the house were you in and what were you doing in that part of the house?

A We had went to the bedroom and he was watching television.

Q When you say "he", is that Reggie?

A Yes.

Q And, you were in there with him as well?

A Yes, I was.

Q Where was everybody else; Shelita, Ian, Jack and Robert? Where would they have been?

[86]

A They were all in the kitchen playing cards, drinking, sitting down chit-chatting.

Q Now, tell me, sometime later that evening, did anything happen? Did you hear anything that drew your attention to the front of the house?

A Yes. I heard something hit the floor.

Q Where were you when you heard that?

A In my bedroom.

Q What did you think it was?

A I thought they was just wrestling, playing or something.

Q What did you say and do at that point?

A I got up and I went up in there, into the living room and I, like, opened the door and I said "What ya'll doing?" And, then, I said that, somebody pointed the gun at me, told me lay on the floor.

Q Let me stop you for a second. You went from the bedroom to the kitchen?

A No, I went by the door.

Q By the door?

A By the door between the kitchen and the living room.

Q Was that door opened or closed when you went to it?

A It was closed.

Q And, what did you do when you went to the door?

A I like, opened it a little bit, but, by the time I opened it, they pointed a gun in my face and told me to lay on the floor.

Q How far did you open the door?

A Not that far. Not enough to step in the [87] kitchen. I didn't open it enough to step in the kitchen.

Q And, when you opened it, what did you see or who did you see?

A I seen a gun pointing me in my face and they told me to lay on the floor. And, I didn't lay on the floor, I closed the door and when I closed the door, that's when they start shooting.

Q This person that you saw in the doorway, were you able to see his face?

A No. He had something covering his mouth, like. He had a hat on. The only thing I seen was his eyes.

Q Did you see what kind of gun he had?

A A big gun.

Q Let me ask you this; was it a handgun, a small revolver or was it gun that —

A It was a gun like that. He was holding it like that.

MR. JORDAN:

Let the record reflect that she's holding two hands out.

THE WITNESS:

Right.

BY MR. JORDAN:

Q Were you able to enter into the kitchen?

A No.

Q Did you even try to enter the kitchen?

A No.

Q What did you do when you saw that gun and that man with the bandanna on his face?

A I closed the door and I went back into the [88] bedroom.

Q How did you go back; did you run or you walked?

A I ran.

Q And, what happened while you were running to the bedroom?

A They was shooting.

Q What's the next thing you did, Rebe?

A The phone rung. I answered the phone.

Q Was the shooting still going on?

A Yes, it was. And, I just hung the phone up. I told them I had to go and I just hung the phone up and I stood in my 'lil hallway and —

Q What were you thinking at that point?

A Couldn't think.

Q Were the shots still going on?

A Yes.

Q Did they keep going on?

A Yes, they did.

Q Did you hear any noise, but for the shots in the front room?

A The only thing I heard was gunshots, loud gunshots.

Q What about Reggie; did you see what he was doing at this time?

A By the time I got back to the room from the door, Reggie was under the bed. He was coming from under the bed.

Q Then, what?

A Just stood back there, and then, the gunshots stopped.

Q The gunshots were going on, did you see Reggie [89] or did you try to get Reggie to arm himself as well with a gun?

A Yes.

Q Where did he get that gun from?

A I don't know. That was his gun.

Q What did you see him do?

A Hum?

Q What did he do?

A Nothing.

Q Did he ever leave that room?

A Yes.

Q I mean, while the gunshots were going on?

A Oh, no.

Q Did he wait until everybody left that house?

A Yes.

Q What did you do when you heard the gunshots stop?

A I just stood there and my neighbor from next door came over there and — he came to see where I was. And, Larry came back there and he just took me outside. I went through there —

Q Tell me what happened when Larry got back there. What did you say and what did he say to you?

A Just asked me was I alright and stuff.

Q Then, what did you do? Did you see Shelita?

A Yes, I did.

Q Where was she?

A She was laying on the floor by the sink.

Q Was she hurt?

A Yes.

Q Did she say anything to you?

A Yes.

[90]

Q What did she say to you?

A She said — she said "Fat, I'm 'gonna die." She said "Don't let me die."

Q What did you say to her?

A I said "I ain't 'gonna let you die."

Q What's the next thing that happened, Rebe? Did you go outside? Did you stay inside? What did you do?

A My neighbor took me outside and the police was passing and I flagged them down.

Q Before you flagged the police down, did Larry do anything?

A He had the rifle and he was standing over the dude, one of the gunmen with the rifle.

Q Did you have to walk through the living room to get to the kitchen?

A Yes.

Q When you walked in the living room, who did you see in the living room?

A Robert and one of the gunmen.

Q When you went in the kitchen, who was in the kitchen?

A Jack, Shelita and Will.

Q Where did Larry get this rifle — this gun?

A It was my cousin's gun. He had left it over there and he had it behind the ice box.

Q Did you see him get it?

A Huh?

Q Did you see Larry get the gun?

A No.

Q And, when you say Larry had this gun, what was he doing?

[91]

A He was pointing it at the dude.

Q And, what did he do?

A He said that — he said "I'm about to kill him," and I said "No, don't kill him," I said, "Because you're going to just make things worser." (sic)

Q What's the next thing you did after that, Rebe?

A Went outside.

Q You flagged the police officer down?

A Yeah.

Q Rebe, did Robert have a gun with him that day; did you notice?

A Yes.

Q What kind of gun did he have with him?

A A 25.

Q Did you see it that day?

A Yes.

Q Did you see it before?

A Yes.

Q I'm going to show you State's Exhibit 4 and ask can you identify this?

A Yes.

Q I'm going to show you what I'm marking as State's Exhibit number 30 and ask can you identify this, ma'am?

A Yes.

Q And, what is that?

A A shotgun.

Q Is that the one that Larry had?

A Yes.

Q Did you have the occasion to look at a diagram of what the inside of your house looks like, where the [92] bedroom, and the kitchen and the living room was?

A Yes.

Q I'm going to show you State's Exhibit # 5. I'm going to ask you, with the Court's permission to step down, ma'am.

THE COURT:

Yes, go ahead. Go ahead.

MR. JORDAN:

Q Okay, Rebe, you can step down. Get to the right of the board and use this pointer.

A Okay.

Q Now, in this diagram, where would the front of the house be? Your bedroom is back there?

A Right here (indicating). The living room, here. The front room, the kitchen is by the front door. And, I had a door on that side.

Q Now, that door where it's a side foyer, did that door work?

A No, I had it boarded up.

Q What about this other door; does that door work?

A I had that door boarded up, too.

Q What was the only way to get into the residence?

A The kitchen door, the front door. And, the kitchen back door.

Q Now, where were you when you heard that thump?

A In my bedroom.

Q Who was in the bedroom with you?

A Reginald.

Q Now, show the jury, how did you get to this door in the kitchen?

[93]

A Through the living room. I went through the den, through the living room and I stopped right there.

Q Did you go further than that point at that time?

A No.

Q Then, what did you do? Which way did you go back after you saw that man with the gun?

A I came back through the den, back through the bedroom. I went in the 'lil hallway by the two doors.

Q Is that where you stayed?

A Yes.

Q Until the end of the gunshots?

A Yes.

Q Where was Reginald?

A He was like in between the bedroom and the hallway.

Q Now, when you went through the living room to that kitchen door, was anybody in the living room at that time; the first time you went?

A The first time, no.

Q Okay. Have a seat.

Rebe, I'm, going to show you what has been shown to Defense Counsel, State's Exhibit number 31, and ask you if you can identify what this is?

A That's a picture of my two sisters.

Q Which one is Shelita?

A The one in the red.

Q Is that when she was in high school?

A Yes.

Q I'm going to show you State's Exhibit number 32 and ask if you can identify this?

A This is Ian.

[94]

Q That's Ian?

A Yes.

Q Do you know when that was taken?

A No, I don't.

Q Now, I'm going to show you State's Exhibit number 33 and ask you if you can identify what this is?

A This is Robert.

Q Do you know when this picture was taken?

A At his homecoming.

Q How long ago would that have been?

A About three or four years.

Q Now, Rebe, after this happened, you had some meetings with a homicide detective, John Ronquillo; is that correct?

A Yes, I did.

Q Now, in the month of March, he showed you a series of photographic lineups; is that correct?

A Yes, he did.

Q How many lineups were you shown in all, from March all the way through June?

A Fourteen.

Q Were you able to make an identification?

A No, I was not.

Q How many people did you see with a gun when you opened that kitchen door?

A One.

Q Could you have seen who else was in that room, based on how far you opened that door?

A No, I ain't seen nobody else.

Q Was that one person in — standing in your way in the doorway?

[95]

A Yes, he was.

Q Now, Rebe, it's still difficult for you today to testify?

A No.

Q Are you alright now?

A Yes.

MR. JORDAN:

I tender, your Honor.

THE COURT :

Tender it back.

CROSS EXAMIANTION

BY MR. LARRE:

Q Do you mind if I call you Rebe?

A No.

Q And, My name is Frank Larre. I represent the gentleman over there, Mr. Juan Smith. If you need to take a break during the questioning, just let me know.

Now, Rebe, you said you don't know Juan Smith. You've never seen him before; is that correct?

A Yes, it is.

Q So he wouldn't have any way to know that you were selling drugs in your house; to the best of your knowledge?

MR. JORDAN:

I'm going to object, your Honor. The defendant — the witness does not known what is inside the Defendant's head?

THE COURT:

Objection sustained.

BY MR. LARRE:

Q You never sold him drugs?

A No.

[96]

Q He never came to your house before?

A No, I didn't know him.

Q Now, the person that you saw that was wearing some covering over his face — some covering over his mouth and his nose. The only thing that was showing was his eyes; is that correct?

A His eyes, yes.

Q Okay. And, can you tell us about how tall that person was? Was he taller than me?

A He was taller than me.

Q How tall are you?

A I'm 5' 5". He was not that much taller than me.

Q Was he heavy-set?

A I really can't say.

Q Do you know what his hair looked like?

A He had a hat on.

Q He had a hat on?

A Yes.

Q Did you see what kind of gun he had in his hands? Was it like the rifle that Larry had?

A No, it was a big gun, like a big handgun.

Q It was not like this handgun (indicating)?

A No.

Q And, it was not like a rifle. Okay. Did you actually see this person fire that gun?

A No.

Q And, he told you to lie down on the floor?

A Yes.

Q And, you didn't do that; did you?

A No, I didn't.

Q Did you run out of the room?

[97]

A I ran to the bedroom.

Q You ran out of the living room to the bedroom?

A Yes.

Q Did he shoot at you?

A Yes, they was shooting through the door.

Q Through the bedroom door?

A Through the door between the living room and the kitchen.

Q And, you closed the door?

A Yes.

Q Nobody came out of the kitchen to chase you down; did they?

A No, they didn't.

Q Now, you testified that when you went into the bedroom, Reggie had a gun.

A Yes, he did.

Q That was not a gun that was in your house, it was a gun that he brought there?

A Yes, it was.

Q What kind of gun did he have? Was it a pistol?

A It was a handgun.

Q Was it bigger than the gun that you just identified as being Robert's gun?

A Yes.

Q Was it as big as the gun that the man in the kitchen had?

A No.

Q And, Reginald didn't go out and shoot anybody; did he?

A No.

Q He stayed under the bed; right?

[98]

A No.

Q Now, you testified that Robert had a gun?

A Right.

Q And, he brought that gun into the house?

A Yes.

Q And, that would be this little gun?

A Right.

Q And, you saw Robert with that gun?

A Yes, I did.

Q And, when did you see Robert with that gun?

A That was since my cousin got killed, he carried that gun all the time, ever since then, ever since January.

Q Okay. And, then, Larry had a gun. He had a rifle that was in the house. And, who put that gun in the house?

A I did.

Q You did?

A It was left there earlier by my cousin, and I just stuck it behind my ice box.

Q Was it loaded; did it have bullets?

A Yes, it did.

Q Was that gun to protect you when you were selling drugs?

A No.

Q Did you have drugs in the house when those people came in?

A No, I didn't.

Q Had you had drugs there earlier that day or the day before?

A Yes, I did.

Q Now, the people who were in your house and [99] were invited, they were drinking?

A Yes, they was.

Q Was Larry drinking?

A I really don't know.

Q But, he was playing cards with the guys who were drinking?

A Yes.

Q How long had he been there?

A Mostly, he had just came around 6:30.

Q About 6:30. So he had been there about two hours?

A Yes.

Q And, he had been playing cards in the kitchen where everybody was drinking?

A Right.

Q What happened when all of the shooting stopped and you went out and Larry had a gun and was pointing it at someone?

A He was pointing it at one of the gunmen.

Q Okay. And, when he was pointing that gun at one of the gunmen, was someone lying on the top of that gunman?

A I don't understand what you just said.

Q When Larry was in the living room pointing the gun at the stranger in the house, was one of your friends laying right next to, or on top of him?

A My cousin, Robert, was laying next to him.

Q Next to him?

A Right.

Q That person that was not invited into your house, did you ever learn his name? Is that Phillip Young?

[100]

A I don't know him.

Q Did he have a gun?

A I don't know.

Q You never saw a gun with him?

A No, I didn't.

Q Were you there when the paramedics rolled him over?

A No. They took me off the scene as soon as the police got there. They took me off the scene.

Q And, the only person — the person that was shot in your house could not have been the person you saw with the mask?

A I don't know.

MR. JORDAN:

Objection to speculation, your Honor.

THE COURT:

Objection sustained.

BY MR. LARRE:

Q Well, the person who had the mask on, what color clothes did he have on?

A Like a big black jacket.

Q A black jacket. And, the person that was on your floor, did he have a black jacket on?

A I don't know. I don't remember.

Q You don't remember?

A No.

Q Now, you looked at some pictures with Officer Ronquillo and — 14 sets is it?

A Yes.

Q And, you were not able to pick anybody out that you recognized. Did he ever show you a picture of the person who was dead on your floor?

[101]

A Yes, he did.

Q Did you pick that picture out or did he show you that picture by itself?

A Well, I asked to see the picture.

Q You asked to see the picture of him?

A Yes.

Q Why did you do that?

A To see who he was.

Q Did you know him?

A No, I didn't.

Q And, you never sold drugs to him before?

A No, I didn't.

Q And, did the police arrest you for selling drugs?

A No, they didn't.

Q So you're not charged with the crime of selling drugs?

A No, sir.

Q Do you know if Larry shot that gun at all?

A No, he didn't shoot it.

Q When the police got there, what was Larry doing; do you know?

A No, I don't know.

Q And, did you help Larry patch up his head?

A No, I didn't.

Q And, do you know when he did that; if he did that?

A No, I don't know.

Q The people who were drinking in the kitchen, were they also doing Marijuana?

A Yes, they were.

Q What about Larry; do you know if he was doing [102] Marijuana?

A Evidently, he was.

Q And, before you testified today, you talked to the District Attorney about what you were going to say today? You didn't go over testimony today?

A Yes, I did.

Q You did. And, you've done that on more than one occasion; is that correct?

A Yes.

Q I have no further questions.

THE COURT:

Tender it back.

MR. JORDAN:

No further questions, your Honor.

THE COURT:

Step down, ma'am.

Call your next witness.

* * * * *

TESTIMONY OF
DETECTIVE JOHN RONQUILLO

* * * * *

[113]

Q State's Exhibit 120?

[114]

A Okay. This is also some articles that were collected from the living room floor. One was a blue bandanna — I'm sorry, black bandanna. And, there were some keys with a Volkswagon key ring that was later determined it belonged to one of the victims.

THE COURT:

One moment. Have the Sheriffs step in my office for one second.

* * * (A BRIEF RECESS WAS TAKEN) * * *

BY MR. JORDAN:

Q State's Exhibit number 121; I ask you if you can identify this?

A Yes. This is the New Orleans Saints Starter jacket, found in the kitchen area over a chair located in the kitchen by the table.

Q You didn't notice any blood that looked like maybe somebody picked it up and put it across the chair; anything that may have been done when it was picked up that might indicate that it may have been on one of the victims at the time?

A It was not on a victim at the time.

Q Now, Detective, did you also have occasion to take into evidence, a beeper that was taken from the person of Phillip Young?

A Yes.

Q How did you get that beeper?

A It was given to me by Detective Anthony Caprerra and his partner, Eric Hessler.

Q I'll show you what I will mark as State's Exhibit 122 and ask you if you can identify this exhibit?

A Yes, this is the reader beeper, a Uniden, [115] which was confiscated from Mr. Phillip Young, who is also a suspect in this case.

Q Now, Phillip Young, he was taken to Charity Hospital from the scene; is that correct?

A That's correct.

Q What did you do with his beeper after you received it? Where did you receive it?

A When I returned to the homicide office after the completion of the scene investigation, Detectives Caprerra and Hessler gave me the beeper. They had recorded the numbers that were in the beeper and I made notes of the numbers that were in the beeper at the time that it was given to me.

Q Did you develope any of those numbers that were in the beeper?

A Yes.

Q Which one in particular?

A 522-2458, or 5248.

Q And, what did you do with the number once you developed it?

A When I got the number, I checked it through directory assistance and they told me that number was registered to Wanda Phillips. Her number was behind a number in the beeper, the 522-2458 phone number, which was 187. If I can explain that. In Los Angeles County, the murder code for the police department, the code of murder is 187.

MR. LARRE:

Your honor, I'm going to object to the relevance of that.

MR. JORDAN:

Your Honor, it is relevant to indicate [116] why the officer was looking at the number —

THE COURT:

Objection overruled.

BY MR. JORDAN:

Q You can continue, Detective.

A The number was in there four or five times with the code 187 behind it. And, since this was a co-perpetrator's property, we thought that that number had some relevance because of the murder code.

Q What did you do at that point in the investigation?

A Well, I continued to develope it, found out that it was registered to Ms. Wanda Phillips. I talked to Ms. Phillips personally. I called the number

and left a message on the answering machine. Ms. Phillips called me back. She said she didn't stay at the residence anymore, which was 2046 Rousseau Street, Apartment C, because she was afraid to stay there because people were trying to kill her son, Kintad Phillips.

MR. LARRE:

Objection to the hearsay.

THE COURT:

Objection sustained. Counselor, you can't illicit any more hearsay. It's improper.

MR. JORDAN:

Yes, sir.

BY MR. JORDAN:

Q You determined who lived at that residence?

A That's correct.

[117]

Q And, who was that?

A That was Kintad Phillips.

Q Now, Officer, pursuant to your investigation, did you compile photographic lineups?

A Yes.

Q What is a photographic lineup?

A The way the New Orleans Police Department does sir, some of the departments vary, but we use six photographs. We take a photograph of the person who we think may be a suspect or a possible suspect and we take five additional

photographs and we put those together and then we let an individual look at six photographs.

Q Did you compile a photographic lineup in this particular case?

A Yes, I did.

Q And, in all, how many photographic lineups did you compile?

A Fifteen.

Q And, the first photographic lineup, what individual was put in that photographic lineup?

A The number one lineup was the lineup with Mr. Kintad Phillips.

Q Officer, in particular, on March 13th, 1995, did you have the occasion to show Rebe Espadron and Larry Boatner any photographic lineups?

A Yes.

Q I'm going to show you what I'm marking as State's Exhibit number 123, 124 and 125 respectively. Officer, where did you show Rebe Espadron and Mr. Larry Boatner these photographic lineups?

A It was shown at 2609 Touro Street.

[118]

Q Who's residence is that?

A Ms. Bertha Harris. It's where Mr. Boatner and Ms. Espadron were staying at the time.

Q Of those three lineups, the first lineup you indicated had the photograph of Kintad Phillips?

A Right. The first lineup was of Kintad Phillips.

Q Did you show that photographic lineup to Rebe Espadron?

A Yes.

Q And, was anybody else present in the room except for you and she when you showed her the lineup?

A My partner, Detective Wayne Rumore.

Q How did you present the lineup to her?

A She had a coffee table which was in the living room area. We put the photographs out, one through six on the coffee table, face up, and she viewed them.

Q Was she able to make an identification?

A No, sir.

Q Did you show that same photographic lineup to Larry Boatner?

A That's correct.

Q Who was present in the room when you showed that photographic lineup to Larry Boatner?

A Once again, it was Mr. Boatner, myself and my partner, Detective Rumore.

Q And, was Mr. Boatner able to make an identification?

A No, sir, he was not.

Q How many other photographic lineups did you bring with you that day to that address on Touro [119] Street?

A Two additional lineups.

Q Those two additional lineups, did you have the suspect, Juan Smith in either of those lineups?

A No, sir. I did not.

Q Did you show lineups two and three respectively, to Rebe Espadron?

A That's correct. Yes, sir.

Q Did she ever make an identification?

A No, sir.

Q Was Larry Boatner ever able to make an identification?

A No, sir. He was not.

Q These lineups two and three; you compiled those lineups pursuant to what part of your investigation?

A They were determined to be associates to Kintad phillips.

Q And, you included these individuals in the lineups to see if there were any possible leads to develope?

A That's correct. Yes, sir.

Q I show you State's 123, and 124 and 125 respectively.

A Exhibit 123 is the photographic lineup of the six photographs we displayed to Ms. Espadron and Mr. Boatner.

Q And, there was no identification?

A No, sir.

Q And, as a result of no identification, did you have either of them sign the back of those photographs?

A No. No.

[120]

Q The same applies to two and three?

A That's correct. Yes, sir.

Q No one signed the back of those photographs?

A No, sir. That's only in the event of an identification.

Q Okay. Next exhibit, 124?

A Yeah. This is the six photographs we displayed to Ms. Espadron and Mr. Boatner with Donielle Bannister as one of the suspects.

Q And, Exhibit number 125?

A Yes. This is the lineup with six photographs with John Jordan as one of the possible suspects. It's six photographs. This also was shown to Ms. Espadron and Mr. Boatner.

Q Now, Detective, you compiled a photographic lineup with a photograph of Phillip Young. Is that correct?

A That's correct. Yes, sir.

Q You didn't show this lineup to any of the witnesses. Is that correct?

A Not to Ms. Espadron or Mr. Boatner, no, sir.

Q I'm going to show you State's Exhibit number 126.

MR. LARRE:

May we approach the bench, your Honor?

THE COURT:

Yes.

(AT WHICH POINT A SIDEBAR DISCUSSION TOOK PLACE.)

[121]

BY MR. JORDAN:

Q State's Exhibit number 126, sir?

A Yes. This is once again, six photographs that we compiled with Phillip Young as a suspect.

Q Would you mark with an A, 126-A, the photograph of Phillip Young?

A I'll just initial, is that fine? How do you want to do it?

Q An "A". And, put Phillip Young on the back of that photograph, the name Phillip Young.

A Sure.

Q Now, Detective, on March 16th of 1995, did you compile two more photographic lineups, lineup number five and six with your investigation, and show these as well to Rebe Espadron and Larry Boatner?

A That's correct.

Q I want to show you exhibits 127 and 128. Were either of these lineups — was Juan Smith a suspect, or rather, put in those lineups?

A No, sir. He was not.

Q And, again, Detective, lineup number five, which you said depicted number 127, did Rebe Espadron make an identification?

A No, sir. She did not.

Q Did Larry Boatner make an identification?

A No.

Q Lineup number 128. Did Rebe Espadron make an identification?

A No, she did not.

Q Did Larry Boatner make an identification?

A No, sir.

Q These are the two lineups that you showed them [122] that day?

A Yes, sir. That's correct.

Q Now, Officer, on March 21st, again, pursuant to your investigation, you compiled some more photographic lineups. Is that correct?

A That's correct. Yes, sir.

Q I'm going to mark these as State's Exhibit numbers 129 and 130, and ask if you can identify those exhibits? Now, with these two lineups, sir, you showed these to Rebe Espadron and Larry Boatner on the same day?

A Yes.

Q And, this was at the address of 2609 Touro Street?

A That's correct. Yes, sir.

Q About 5:40 in the afternoon?

A Yes, I believe so.

Q And, first, as to Rebe Espadron, was she able to make an identification?

A No.

Q Of either lineup?

A Neither one, no, sir, either seven nor eight.

Q Larry Boatner, was he able to make an identification?

A No, sir.

Q Of either lineup?

A No, sir.

Q For the record, was Juan Smith in either of these two lineups?

A No, sir. He was not.

Q Detective, March 22nd of 1995, did you show lineup number nine to Rebe Espadron and Larry Boatner?

[123]

A Yes, sir.

Q You did this on Touro Street?

A Yes, that's correct.

Q And, in this lineup identification, was Juan Smith's picture included?

A No.

Q First, was Rebe Espadron able to make an identification?

A No, sir.

Q And, was Larry Boatner, was he able to make an identification?

A No, sir.

Q And, neither of them signed the back of the photograph as well; correct?

A No, sir.

Q Officer, the final lineup procedures you showed in the month of March, that's March 29th, 1995, was three lineups; that's lineups, according to your investigation, lineups 10, 11 and 12, I'll mark as State's Exhibit numbers 132, 133 and 134 respectively. Detective, again, these lineups were shown at 2609 Touro Street?

A Yes, sir. That's correct.

Q This would have been at approximately 3:15 in the afternoon?

A Yes, sir.

Q Was Rebe Espadron able to make identification of either one of those three lineups?

A No.

Q Did Larry Boatner make an identification of either one of those three lineups?

A No, sir.

[124]

Q On March 29th?

A No.

Q Juan Smith — the lineup was done on March, 29th; correct?

A That's correct, to the best of my recollection.

Q Juan Smith, he wasn't pictured and wasn't in either of these three lineups. Is that correct?

A No, sir.

Q So, at this point, Officer, March 29th, 1995, you showed Rebe Espadron and Larry Boatner 11 photographic lineups. Is that correct?

A That's correct. Yes, sir.

Q You didn't show them lineup number 4 with Phillip Young's picture in it. Correct?

A That's correct. Yes, sir.

Q And, how many pictures were in this lineup?

A Six.

Q So, that would be 66 pictures you showed to each of them. Correct?

A What we showed? We showed 11. Yeah, 66.

Q Now, Officer, in one of these lineups, Larry Boatner did indicate that a facial expression and haircut looked similar to one of the perpetrators. Is that correct?

A That's correct.

Q Which lineup was that?

A Let me see them a minute. I remember the man's name in the pictures, Wadell Holliman (phonetically).

Q I show you State's Exhibit 131, lineup number 9 that you showed them.

[125]

A I can't remember exactly which one he was in, but I remember the occasion.

Q That one?

A Yeah.

Q This photographic lineup that you show on March 22nd to Larry Boatner, the ninth lineup — you compiled the eighth lineup and showed it to him. What did he indicate, looking at that photograph?

A He pointed, he said that the gentleman that came into the house initially with the gun that he confronted, had this similar haircut and he said had a similar expression on his face, but he was positive this wasn't the individual.

Q But, he pointed out the characteristics of the —

A Haircut. And, he said the expression or smirk on the face, he said "It's just the way he looked at me."

Q The back of that photograph, I'll mark that as State's Exhibit 131-A. Would you put haircut and smirk on the back of that photograph?

A Yes.

Q Officer, pursuant to your investigation, did you develope the name of Juan Smith?

A Yes, I did.

Q When did you develope the name of Juan Smith?

A That would have been in the end of May.

Q The end of May?

A Yes.

* * * * *

[127]

Q Were you subsequently able to locate Larry Boatner?

A Yes.

Q And, what date — would that have been June 28th when you were actually able to show him the photographic lineup?

A That's correct. Yes, sir.

Q Now, where was it that you showed Larry Boatner this photographic lineup?

A At Charity Hospital.

Q Was that about 2:55 in the afternoon?

A Yes.

Q Who was present when you showed him this lineup?

A He had an aid with him; Jane Mills.

Q And, on what floor were you on at Charity [128] Hospital?

A Third floor.

Q Now, how long did you meet with Larry Boatner?

A I guess we were there about 15 minutes. We talked for a while and I asked how he was feeling, things like that, and then we displayed the lineup to him.

Q Now, how did you present the lineup to him?

A He was seated at a desk. There was a desk that was in one of the offices where we was seated and once again, we placed the six photographs, one through six out on the desk and he immediately went to Mr. Juan Smith's.

Q Did you force or coerce him to make this identification?

A No, sir.

Q Did you promise him anything to make this identification?

A No, sir.

Q Did you suggest to him who to pick out?

A No, sir. In fact, he said he'd never forget that face.

Q Who did he say that to?

A When he picked him out, he said "This is it. I'll never forget that face."

Q Then, what did he do?

A Then, he was asked to sign the rear of the photograph of Mr. Smith, photograph number two. He signed it. He placed the date and time that he made the identification on that and I placed my initials on that. He also took the remaining five photographs. He just placed his initials, the date and time of the [129] viewing on the backs of those.

Q Was he positive of this identification?

A Oh, yes.

Q Now, you also showed him two other lineups after that. Is that correct?

A That's correct.

Q And, that was lineups 14 and 15?

A Yes, sir.

Q Juan Smith wasn't in either of those lineups. Correct?

A No, sir.

Q Did Larry Boatner make an identification of either of those lineups?

A No, sir.

Q So of all the 14 lineups that you showed Larry Boatner, he made one identification, lineup number 13 of Juan Smith. Is that correct?

A That's correct. Yes, sir.

Q Was he positive of his identification?

A Yes.

* * * * *

[130]

Q State's Exhibit number 137, previously identified as the same lineups that you showed to Larry Boatner. Correct?

A Right.

Q Sir, do you see in court today, the individual that Larry Boatner pointed out as the one that came in with the gun on March 1st, 1995, at 2230 North Roman Street?

A Yes, sir. I do.

Q Would you point him out to the jury?

A He's seated to the left of Counsel, Mr. Frank Larre. He's a black male, has on a multi-colored shirt. He has the short, high-top haircut.

MR. JORDAN:

Let the record reflect identification of Juan Smith.

THE COURT:

Let the record reflect it.

BY MR. JORDAN:

Q Officer, Phillip Young, did you have the occasion to — don't say what he said if he said anything to you — to speak with him any particular time after this incident?

A Yes.

Q Where did you meet with him?

A It was at F. Edward Hebert Hospital on the first occasion. It was in an Extended Care Facility?

Q What was his condition?

A He was strapped to a chair. He really [131] couldn't talk, He mumbled. He could use his left hand, that was all. He couldn't walk or anything. He was fed through a tube by the people there. He was in really bad shape.

Q How many times was he shot?

A He was shot three times. One time that made — that crippled him, was the one that went through the right side of his head.

Q And, the other two times?

A Once in the right side, in the right side and the right leg.

Q Was he able to communicate with you at all?

A No. I couldn't understand anything that he was saying. No.

MR. JORDAN:

Your Honor, at this time, I would offer, file and introduce for the record, State's Exhibit number 34 through State's Exhibit number 113. That is all of the crime scene photographs, and ask that they be published to the jury.

MR. LARRE:

The objection that was previously lodged.

THE COURT:

Alright. Permitted to be introduced into evidence. Let me see the photographs one more time before —

***(AT WHICH POINT, A SIDEBAR DISCUSSION TOOK PLACE).

(THE EXHIBITS WERE DISPLAYED TO THE JURY)

(ANOTHER SIDEBAR DISCUSSION TOOK PLACE.)

BY MR. JORDAN:

[132]

Q Detective, I just have a couple more questions. March 1st, you met with Larry Boatner?

A That's correct. Yes, sir.

Q And, you met with Larry Boatner on March 1st, at the crime scene?

A Yes, that's correct.

Q And, what was his emotional condition when you met with him?

A Obviously, he was shook up from the incident, but he appeared to be very coherent. He answered all my questions, he articulated very well the events that had transpired. As a matter of fact, I thought he held up very well for what had happened, you know, in the house.

Q Did he appear drunk to you?

A No.

Q Did he appear like he was on any sort of intoxicants, any sort of drugs or anything of that nature?

MR. LARRE:

Objection, your Honor.

THE COURT:

Objection sustained as to that.

BY MR. JORDAN:

Q Did he appear coherent to you?

A Yes, very much so.

Q Was he able to relate facts to you coherently?

A Yes. He told me what happened, described the vehicle. He was just like any other witness, except he had — he was — he seemed pretty normal, you know. He didn't seem out of the

ordinary, you know. He [133] articulated real well.

Q And, when you met Larry Boatner on June 28th and showed him the photographic lineup, that was at Charity Hospital. Is that correct?

A Yes, sir. That's correct.

Q Did it appear to you — was Larry Boatner on any sort of medication that you knew of?

A No.

MR. LARRE:

Objection.

THE COURT:

Objection sustained.

BY MR. JORDAN:

Q Did he appear to be coherent to you?

A Very much so.

Q Was he able to easily have a conversation with you?

A Yes, just like I'm talking to you. I mean, I asked him how he was feeling, his family and everything else.

THE COURT:

Any other questions?

MR. JORDAN:

No, your Honor. Tender the witness.

* * * * *

[135]

Q And, Phillip Young, you stated earlier, was taken out of the residence before you got there?

A That's correct. Yes, sir.

* * * * *

[137]

CROSS EXAMINATION

BY MR. LARRE:

Q Officer, you're in charge of the scene. You're in charge of the whole case. Is that correct?

A Yes, pretty much so.

Q And, you went in and had this area dusted for fingerprints. Is that correct?

A I dusted areas that I thought were suitable to be printed that night. It's — some of the areas were wet. I think with the cold weather outside and the door being opened and closed, with the heater on, it's a great deal of condensation, and condensation and wetness destroys fingerprints. So areas that I thought that I could possibly get some fingerprints from, especially in proximity to spent casings, that's where I concentrated on.

Q And, none of this — you didn't find any fingerprints there that showed up to be Juan Smith's?

A No, sir. I didn't. I can say, we didn't find any fingerprints, as amazing as it may seem.

Q And, you had no — no one has identified Juan Smith, other than Mr. Boatner. Is that correct?

A That's correct. Yes, sir.

Q And, when you went to see Mr. Boatner and he made that identification, he had been in the hospital for some days. Is that correct?

A That's correct.

Q He was actually — you said you saw him on the third floor?

A That's correct. Yes, sir.

Q Is that the psychiatric floor?

A He was not confined to that floor. He was on the [138] ninth floor.

Q And, that floor also deals with emotional problems?

A I believe it's a substance abuse floor.

Q Substance abuse. He was in, actually, in the hospital for substance abuse. Is that correct?

A For an alcohol problem. Yes.

Q And, did you discuss with him how long he had been on alcohol before he put himself into the hospital or before he was put in the hospital?

A He had been in the hospital for at least, I talked to his mother, I would have to say it had to be at least — I talked to his mother and it was at least two days later, so he had to be there at least three days.

Q But, my question is, did you question him or the doctors to find out how long he had the alcohol abuse problem before he went to the hospital?

A No, I didn't talk to his doctors about his alcohol abuse problem. No.

Q Did you talk to him about that?

A We touched on it. I didn't ask him how long he had been drinking alcohol.

Q And, did he discuss with you what problems he was having with alcohol that made him severe enough to be placed in Charity Hospital?

A No. My main concern when I spoke to him, was to make sure he hadn't — since he had been in the hospital for three days, he hadn't consumed alcohol for three days, or any medication. That was my biggest concern, just so the lineup wouldn't be tainted.

* * * * *

[139]

* * * * *

Q And, when you showed him these pictures, did he ever communicate to you that some of his friends had told him some things that led him to believe he knew who it was?

A Oh, no. No.

[140]

Q He never communicated that to you?

A Oh, no. No.

Q And, did he communicate to you, ever, that he had seen a picture in the newspaper and he thought that to be the person.

A Yes.

Q And, when did he do that?

A It was on June the 28th.

Q And, did he tell you the name of the person he saw in this paper?

A No, I don't believe he knew it.

Q He never did mention that he knew the name of the person that he saw in this paper?

A No. He told me that he saw the person that came in the house, in the newspaper. I believe it was the June 4th Times Picayune. He never did mention anything about a name.

* * * * *

[141]

Q What I was asking is, if you've ever done anything as part of your investigation to determine what he might have seen in the newspaper that could have tainted this identification?

A He told me that he saw the picture in the newspaper and he said that was the man that — that one of the men in the picture was the man that came in through the door.

Q But, you didn't investigate that any further?

A Well, I found out when I went on the 28th, when I had the pictures.

Q Well, that was in June, this is November — December. You've never done anything to look at that or compare them or do any of those things?

A My impression was, he read the newspaper, there was four pictures supposedly. One guy,

he identified as being the individual. I had made that lineup prior to that newspaper article ever coming out.

Q And, it's your impression he read the article as well?

A Well, I don't know if he read the article. What I'm saying, he saw the pictures in the newspaper. Whether he read the article or not, I don't know. When he saw the pictures, he identified one of those men as being —

Q And, did he tell you that he had gotten phone calls from people, friends or so forth, that told him that those pictures were in the newspaper?

A No. I never heard any of that.

Q Now, you made a lineup with Mr. Phillip Young?

[142]

A Yes.

Q Lineup number four?

A Yes, sir. That's correct.

Q But, you never showed that to anyone. At some point in time, did you show an individual picture of Phillip Young to Rebe?

A I don't remember, but I don't think.

Q But, you never asked her to look and see if that was the person she saw; Mr. Young?

A She didn't see the person. Oh, yeah, she identified him on the scene, I apologize. She identified him on the scene as being one of the individuals — as being one the of the individuals that came in. So did Mr. Boatner. So, I didn't

think it was necessary to show them another identification process since he's already been identified on the scene.

Q And, she's never asked you to look at Mr. Young's picture?

A She's asked. She's asked me to look at a lot of the pictures. And, I can't show individual pictures like that.

Q And, you never showed her Mr. Young's picture?

A Not that I can recall. No, sir.

Q And, you never showed her — she asked you to see Mr. Young's picture, but you never put it in the lineup?

A No.

Q Did you put it —

A I had a lineup, but it was never presented to her or Mr. Boatner. That's correct.

Q And, that lineup was never presented to [143] anyone?

A Not that I can recall. No.

Q And, how many times did you meet with Mr. Boatner before he actually picked out this picture?

A Well, I know I met with him at least on — was it 11 occasions — well, not 11 occasions. It may have been, 'cause we showed three, two — maybe four or five times. But, it was all to show lineups; different lineups.

Q Now, on March the 1st, when you met Mr. Boatner, did you talk to him?

A Yes, on the scene. Yes.

Q On the scene. And, you said he was coherent and didn't seem to be intoxicated and was able to — lucid in answering your questions; is that correct?

A He didn't appear to be intoxicated. Like I said before, the man was shook up, but not anymore than any other witness I'd ever spoken to in the past that had been — had seen a crime or been involved in a crime. It didn't seem to be anything out of the ordinary.

Q How did he describe the person that hit him in the head on March the 1st?

A He basically said that he had short-type haircut. He said he had a lot of golds in his teeth and he said he had a chrome handgun.

Q Did he talk about height and weight, color of his skin?

A He said he was brown-skinned.

Q What about how tall he was?

A No, he didn't tell me that.

Q Did he talk about thick in the chest, or [144] heavy-set?

A No, he said he was concentrating more on the gun than anything, if I remember correctly.

Q Concentrating more on the gun than anything?

A Right.

Q And, did he tell you that the person pushed him into the door and said "Get down on the floor" and hit him in the head.

A Well, he said he saw the man come in —

MR. JORDAN:

Your Honor, at this point, I'm going to object to hearsay. Larry Boatner will be here to testify and answer all these questions for the Counsel.

MR. LARRE:

This is no different than his impression of what Mr. Boatner said.

THE COURT:

I'm going to let him testify.

THE WITNESS:

Well, let me explain. Sequence of events; let me go back. They came through the door —

BY MR. LARRE:

Q This is coming from Mr. Boatner?

A Right.

Q He confronted the man face-to-face. He saw the man. He saw the man come through the door, okay. Then, the man presented a gun and they were ordered to go on the floor. He said, at that point, he got down and then, at one point he got back up and the same man ordered him to get back on the floor. So he repeatedly [145] saw him through the incident, and then he was struck in the back of the head.

Q By "repeatedly," you mean twice?

A He saw him as he backed up. He was on the floor, he got up. He looked at him quite a while, apparently.

Q Did he tell you that, or is that something you assumed?

A No. When they came in — this is what he said. They came in the door. He looked at him. Came in, he opened the door. They came in. Then, he said the man presented the gun. He said he put him on the floor. He said he stood back up. The man told him to get back on the floor again. He said that's when he got hit in the back of the head.

Q So, he looked at him twice?

A Right.

Q And, did this take minutes to happen, or was it real quick?

A Did it take minutes? I wouldn't say it took minutes. He said things happened rapidly.

Q Rapidly. Did he see anyone — did he see any other person come in, but the one who hit him?

A He thought there was three people that came in, but he only concentrated on the first person through the door, because he had the gun.

Q He didn't see the gun of the other people —

A Yes. He saw those too.

Q He saw guns?

A Right.

Q Did he see bandannas on anybody's face?

A He didn't say that, no.

[146]

Q Did he see a hat on anybody?

A He told me that he could only identify the first person through that door. That's what he told me. He said he didn't pay that much attention to this other two, but he was positive he could identify the first man through the door.

Q Because it was happening so quickly, he saw that first person?

A As he told me at later interviews, when he identified him, he said he would never forget that man's face. That's what he told me.

* * * * *

TESTIMONY OF VIOLA RUSSELL

* * * * *

[153]

Q Did you see your daughter after that?

A In the hospital, yeah. That night in the hospital.

Q How long was she in the hospital?

A Like, ten days.

Q Was she ever conscious and able to talk to you?

A No.

* * * * *

TESTIMONY OF EDDIE YOUNG

DIRECT EXAMINATION

[158]

BY MR. JORDAN:

Q Sir, please state your name for the record.

A Eddie Young.

Q How old are you, sir?

A Twenty-four.

Q No, have you ever been convicted of any crimes?

A Yes, armed robbery.

Q When were you convicted of armed robbery?

A December the 1st of '94.

Q How much time did you get?

A Seven years.

Q You're currently serving that time?

A Yes, sir.

Q Do you have any other convictions?

A Yes.

Q What is that?

A Possession with the intent to distribute Crack cocaine.

Q When were you convicted of that?

[159]

A In '92.

Q And, how much time were you given for that?

A Five years probation.

Q Is that probation that you received on that case pending right now? Is it still open?

A Yes.

Q Now, do you know someone by the name of Phillip Young?

A Yes.

Q Who is that?

A My brother.

Q How old is he now?

A Eighteen.

Q Do you know whether or not Phillip Young knew Juan Smith?

A Yeah, he knew him.

Q Did you ever tell anything to your brother, Phillip, about Juan Smith?

MR. LARRE:

Objection. That is not relevant.

THE COURT:

Objection sustained.

MR. JORDAN:

I tender, your Honor.

THE COURT:

Tender to you, sir.

MR. LARRE:

No questions.

THE COURT:

Step down, sir.

Call your next witness.

* * * * *

TESTIMONY OF DETECTIVE KENNETH LEARY

DIRECT EXAMINATION

[160]

BY MR. MENNER:

Q Detective Leary, how long have you been a police officer with NOPD?

A Fourteen years and three months.

Q And, where are you currently assigned?

A I'm currently assigned to the Crime Laboratory as a Firearms Examiner.

Q And, how long have you been doing that?

A Since May of 1989.

Q And, can you describe and explain to the jury what a Firearms Examiner is?

A As a Firearms Examiner, my primary duties are to test-fire and examine weapons that are collected from persons illegally carrying them, from crime scenes, from search warrants. I test-fire these weapons and microscopically examine the cartridge case and bullet that I test-fire to cartridge cases and bullets test-fired from crime scene, autopsies and what have you, in an attempt to determine whether or not these particular weapons that are submitted for testing [161] were, in fact, the weapons used during the commission of certain offenses.

Q And, how many examinations such as these have you done?

A We don't keep an active account of everything that we do, but since 1989, I would estimate several thousand cases that I've worked.

Q Have you been qualified as an expert in firearms examination before?

A Yes, I have.

Q Can you estimate how many times?

A That would be in the hundreds.

Q Have you been qualified in this court, in Criminal District Court, Orleans Parish?

A Yes, I have.

MR. MENNER:

Your Honor, at this time, I'd like to tender Detective Leary as an expert in firearms examinations.

MR. LARRE:

Stipulate.

THE COURT:

So stipulated for the record.

MR. MENNER:

Thank you.

BY MR. MENNER:

Q Detective, I'm going to ask you, did you examine bullets, and casings and fragments that were recovered from the scene on March 1st, 1995, at 2230 North Roman Street?

A Yes, I did.

Q And, as a result of your examination, did you [162] prepare a report?

A Yes, I did.

Q I'm going to show you what I'm marking now, as State's Exhibit number 144.

BY MR. MENNER:

Your Honor, a copy has been previously tendered to Defense Counsel.

BY MR. MENNER:

Q Do you recognize this report?

A Yes, sir. This is a xeroxed copy of the report that I prepared upon completing my examination of the evidence submitted.

Q And, what evidence, exactly, did you examine? Was there a gun involved in that?

A Yes, sir. There was a X-Cam (phonetically) ATG model GT-27, 25 caliber semi-automatic pistol that was recovered from the scene at 2230 North Roman Street.

Q I'm going to show you what's been previously marked as State's Exhibit number 4; is this the gun that you tested?

A Yes, sir. It is.

Q And, did you also examine bullets, casings and fragments?

A Yes, sir, several cartridge cases. There were three 25 caliber cartridge cases, a total of 26 9-millimeter cartridge cases and 19 7.62 by 39 millimeter cartridge cases.

Q Let me show you what's previously been marked as State's Exhibit number 142. Do you recognize that?

A Yes, sir. These are three fired 25 caliber cartridge cases and one live 25 caliber cartridge that [163] was recovered from the scene at 2230 North Roman Street.

Q Did you run any tests to determine if those cartridges had been fired by State's Exhibit number 4?

A Yes, I did.

Q And, what were the results of that examination?

A Based upon my examination of the firing-pin impression, breached-face markings and ejector and extractor markings, I was able to determine that those three cartridge cases were, in fact, fired by that 25 caliber semi-automatic pistol.

Q And, did you do any other comparisons of these other bullets and fragments?

A Yes, I did. It was requested by Detective Ronquillo that I examine each cartridge case and bullet that was recovered from the scene to determine — to hope to determine exactly how many weapons may have been used during this offense.

Q You didn't have any other guns to compare those bullets or casings to?

A No, sir. That was the only weapon submitted for testing.

Q Now, what types of bullets and casings did you find? What types of bullets?

A I found — like I said, there were a total of 26 9-millimeter cartridge cases that were collected from the scene from various locations at 2230

North Roman Street. There was a total of 19 fired 7.62 by 39 millimeter cartridge cases.

Q And, what type of gun is that bullet used for?

A That ammunition is for AK-47 semi-automatic [164] assault rifles, which are very high-powered rifles used primarily for military purposes.

Q And, were any other types of bullets recovered?

A No, sir, other than the 9-millimeters and 25 caliber, there weren't anything else. Just fragments and —

Q So there were three types of bullets; 9-millimeter bullets, the AK assault rifle bullets, 7.62's and the 25 caliber. Is that correct?

A Yes, sir.

Q Now, were you able to determine how many weapons were used?

A Yes, Sir. There were — out of the 26 9-millimeter cartridge cases, again, based upon my examination of the firing-pin impression, breached face-markings and ejector and extractor markings, all these markings are unique and produced by one, and only one handgun, exclusive of all others. That's what gives us the ability to determine whether or not cartridge cases were fired by one particular weapon.

After examining all 26 of these cartridge cases, the 9-millimeter cartridge cases, I was able to reach the conclusion that all 26 cartridge cases was fired by one particular weapon, one 9-millimeter handgun.

Q And, what about the 7.62's?

A Out of the 7.62 by 39 millimeter cartridge cases, I was able to determine that 18 of them were positively fired by one 7.62 by 39 millimeter assault rifle. There was one that didn't mark as prominent or as sufficient as the others, therefore, that one is listed in my report as being insufficient to render a [165] conclusion. That means that it could have been fired by the same rifle as the other 18 and, then again, it could have been fired by another rifle similar to that. It was just inconclusive and there was basically no decision I was able to make on that last cartridge case.

Q Detective Leary, I'm going to show you what's been previously marked as State's Exhibit number 30. Do you know what type of weapon that is? Could that have been used — that is not an AK assault-type weapon; is that correct?

A No, sir, it isn't.

Q That's not the type of weapon that would have been used for a 7.62 bullets?

A No, sir. This is a 410-gauge shotgun. This weapon could not have fired any of the ammunition components that were recovered from the scene at 2230 North Roman Street.

* * * * *

SIDEBAR

[178]

MR. LARRE:

Your Honor, this entire case that we've now heard all of the evidence on, except the testimony of this witness, revolves on his identification. He's going to say that he seen this picture in the newspaper and he's going to show these pictures of the newspaper. However, I have no possible way to explain why my client's mug shot was in the newspaper. So therefore, it indicates without a doubt, that he was involved in another crime or that he was a suspect in this crime.

And, what I'm suggesting, there's a portion of the article that says he was a suspect in this crime and that's the basis of him being placed in the newspaper with those particular people, because the policeman says he got Phillips' phone number off the beeper and Phillip's picture is in there. So maybe, he's going to say they're associates of these people. We'll have four pictures, color pictures that were in the newspaper. Without an explanation, it's entirely too prejudicial.

THE COURT:

What are you asking me to do?

MR. LARRE:

This is a three page article. The headlines of the article are "Benny Thompson." The body of the article talks about Benny Thompson, but there is a portion that says [179] these people are suspects in the North Roman Street situation.

THE COURT:

Let me see. What he's saying is, why would their pictures be in the paper. Maybe —

MR. LARRE:

That's evidence of another crime.

THE COURT:

Where's the excerpted part —

MR. LARRE:

The grey area on the next page.

(THE COURT READS THE ARTICLE)

MR. LARRE:

Judge, I don't have any way to explain these pictures.

THE COURT:

It's your stipulation that these pictures were placed in here as suspects of this event.

MR. JORDAN:

The thing is, the Detective —

THE COURT:

No. No. It's going to go in with that explanation. If not, it's not going in, period. It's going in because of this reason. You have to have a reason for it to be in the newspaper.

MR. MENNER:

But —

THE COURT:

[180]

But nothing. Huh?

MR. MENNER:

That's not the reason why it was in there. It wouldn't be correct —

MR. LARRE:

It's one of the reasons.

THE COURT:

It's one of the reasons. You can't elude to something — you don't want to mis-try your case.

MR. MENNER:

Yeah, but Judge —

THE COURT:

Listen to me. But, nothing. I'm telling you what I'm doing. I'm going to let it in. Look, I'm trying to be reasonable with you, but you're not going to have your cake and eat it, too. Alright, you want these pictures to go in? You don't want them to go in?

MR. MENNER:

No, I want them to go in, Judge.

THE COURT:

Alright. Then, what I'm saying is, if you want them to go in, you're going to have to say that these people's pictures appeared in the paper as suspects to this event.

MR. MENNER:

Where does it say that in the article?

MR. LARRE:

[181]

I don't care where it says it.

MR. MENNER:

Well, the problem is, and let me explain this. It doesn't say it in the article and —

THE COURT:

It doesn't say that anywhere?

MR. MENNER:

I don't think so, Judge. And, as for his credibility, he wants to put that in there because he wants to taint the identification.

THE COURT:

Wait a minute. But, you've got to have a reason to be in the paper. You can't elude to bad acts. These are mug shots. Do you understand, you're going to blow the trial.

MR. LARRE:

It is in here, Judge. It's says they were suspects.

THE COURT:

Where do you see that at?

MR. LARRE:

It says it right here. Right here, Judge.

THE COURT:

Where?

MR. LARRE:

This paragraph.

THE COURT:

Yes, it says it in there. It says [182] "Principal suspects of March 1st massacre of five people." They were the principal suspects. It says "Detectives are

looking at the Cut Throat Posse alumni as the primary suspects in the March 1st massacre of five people in a house on North Roman Street."

So, I would say, in order to get this in, you're going to have to say that these pictures were put in the paper for the reason being, that they were the principal suspects.

MR. MENNER:

Well, we could read that the Times Picayune —

THE COURT:

You can't read it.

MR. LARRE:

But, the Judge can say why those pictures were in the paper.

THE COURT:

If you agree, I'll say that. If ya'll agree to it, because I don't want to comment on the evidence.

MR. MENNER:

Well, how about reading that one article?

MR. LARRE:

Where else in the evidence is the Cut Throat Posse?

THE COURT:

Oh, I'm not reading that.

MR. LARRE:

[183]

You got to be crazy.

MR. MENNER:

No, I didn't say that.

THE COURT:

That's in the article. I'm not reading it. I'm saying, if you want the pictures in, you're going to have to say that they were suspects in this incident. The picture was placed in the paper as suspects in this incident.

MR. MENNER:

Okay.

MR. LARRE:

Okay.

THE COURT:

How are we going to say that? Are we going to agree to it? If not, I'm going to say what I originally said. I'm going to cut out the pictures.

MR. LARRE:

What I was thinking, we can say that as a result of the bench conference, you're going to allow the pictures in that were printed in the newspaper, indicating that these people were suspects in this particular case.

THE COURT:

Alright. Who's going to say that?

MR. LARRE:

That will be your ruling from the bench.

MR. JORDAN:

Or, we can say that one or the other of [184] us is —

MR. LARRE:

And, you're admitting them —

THE COURT:

Okay. But, I don't want to be commenting on the evidence, so what you're going to have to do is you have to agree on the record that I say it.

MR. JORDAN:

We'll both stipulate to it.

MR. LARRE:

And, I stipulate to that.

THE COURT:

Okay. And, how are we going to cut this thing?

MR. JORDAN:

Cut it straight across.

THE COURT:

Do you want the "Still at large."

MR. JORDAN:

Yes, the "Still at large," because that's important for what the witness is going to say.

MR. MENNER:

Yeah, we need to put that.

MR. LARRE:

Alright.

THE COURT:

Okay.

MR. JORDAN:

The stipulation being that the four photographs in the Times Picayune from June [185] 7th 1995 and, that they were in the Times Picayune. And, that they were in the Times Picayune at the bench conference. The jury is only to consider it because they were suspects in this North Roman case.

MR. LARRE:

Alright. Okay.

THE COURT:

And, what's the date of this newspaper article?

MR. JORDAN:

June 7th.

THE COURT:

You want me to state it?

MR. MENNER:

Yes.

THE COURT:

Let the record reflect that both the State and the Defense are asking me to state the stipulation in the record, as was stipulated to, as these pictures were in the Times Picayune on June 7th of 1995.

MR. LARRE:

I agree.

ANOTHER SIDEBAR DISCUSSION TOOK PLACE.

THE COURT:

Alright, call your next witness.

MR. JORDAN:

The State calls Larry Boatner.

TESTIMONY OF LARRY BOATNER

[186]

* * * * *

LARRY BOATNER

WHO AFTER HAVING BEEN FIRST DULY SWORN TESTIFED ON HIS OATH AS FOLLOWS:

THE COURT:

State your name for the record, please.

THE WITNESS:

My name is Larry Boatner, Jr.

DIRECT EXAMINATION

BY MR. JORDAN:

A Larry, how old are you?

A Twenth-six.

Q Are you from New Orleans?

A Yes, I am.

Q Are you married?

A Yes, I am.

Q How long have you been married?

A Four years.

Q Do you have any children?

A Yes, I do.

Q How many children?

A One.

[187]

A How old is your child?

A Four.

Q Are you currently separated?

A Yes.

MR. LARRE:

Your Honor, we'd ask that he not lead his witness.

BY MR. JORDEN:

Q Did you go to high school in the city?

A Yes, I did.

Q Where did you go to high school?

A John McDonogh.

Q Where do you work now?

A Xavier University.

Q What do you do at Xavier?

A Janitorial work.

Q How long have you been working at Xavier?

A Since March, I believe the 27th, somewhere in that area.

Q Have you ever been convicted of any crimes?

A Yes, I have.

Q What crimes were those?

A Battery and also carrying a concealed weapon.

Q Those were misdemeanors?

A Yes.

Q What sentence did you get for the battery?

A Ninety days.

Q What sentence did you get for carrying a concealed weapons?

A A year's probation.

[188]

Q Are you still on probation today?

A Yes, I am.

Q Did you know Rebe Espadron?

A Excuse me?

Q Did you know Rebe Espadron?

A Yes.

Q. How did you know Rebe?

A I met her through a friend of mine, Robert Simon.

Q How long have you known Robert Simon?

A Seven or eight years.

Q How close were you to Robert?

A Real close, like best friends.

Q Tell me about Robert, what your relationship was like?

A We always use to hang out and party together, go different places, hang out with his family most of the time, just talk about how he wanted to own his own business and things like that.

Q How long have you known Rebe Espadron?

A I been knowing Rebe about five years.

Q Did you also know Ian Jackson, James Jackson, Jack Jackson?

A Yes.

Q How did you now them?

A I met them through Robert. Jack use to work with Robert and I use to live with Robert at one time. I met Jack through him and I soon met Ian.

Q Were you were good friends with either Ian of Jack?

[189]

A Both.

Q How often did you see them?

A Like I said, I use to live with Jack at one point and Ian would come around like maybe once a week.

Q Did you know Shelita?

A Yes.

Q How long did you know Shelita?

A I had just recently met Shelita in January, when I came back from Mississippi, which was in December.

Q What do you remember most about Shelita?

A She loved to sing, use to always sing.

Q Did you consider her a friend?

A Yes.

Q Did you ever go to the house at 2631 N. Roman Street where Rebe Espadron lived?

A Yes.

Q When did you first go there?

A Sometime in January.

Q Of this year?

A Yes, sir.

Q Why do you say January of this year?

A That's when I went over there.

Q Where were you before that?

A I was in Mississippi.

Q How long were you in Mississippi?

A Eight months.

Q What were you doing in Mississippi?

A Working.

Q How often did you go to Rebe's house?

A Every other day.

[190]

Q Did Rebe have a nickname for you?

A She called me Jeffrey 'cause I use to always clean her house up for her and she'd say,

Jeffrey, would you clean my — do this or do that, so she called me Jeffrey.

Q Where did she get the name of Jeffrey from?

A From the Fresh Prince of Belaire.

Q Did you know whether or not Rebe and Robert ever sold drugs from that house?

A Yes, I did.

Q When did you come to learn that?

A Late January.

Q Do you know what kind of drugs they sold from that house?

A They sold crack cocaine and marijuana.

Q Do you know how much they sold?

A No, I don't.

Q Were you ever involved in selling drugs with them?

A No, I wasn't.

Q Did you do crack cocaine?

A No, sir.

Q Did Robert do crack cocaine?

A No, sir.

Q Did Rebe do crack cocaine?

A No, sir.

Q I'm going to draw your attention to March 1 of 1995, Ash Wednesday, the day all the shooting happened. On that date did you go to Rebe's house?

A Yes, I did.

[191]

Q Do you recall about what time you went to her house?

A Later on that evening, about 3:30 or something like that.

Q How did you get there?

A I believe I caught the bus or rode a bike, I don't quite remember.

Q Do you recall who was there?

A Rebe and Shelita.

Q Was anybody else there at the time?

A Not to my knowledge.

Q Did anybody arrive later on that evening.

A Yes.

Q Who was that?

A Jack and Ian came over, Will came over, and Reggie came.

Q Did you know Reggie?

A Through Rebe, I do. She had just met him and I just knew him through her.

Q Did you know him very well?

A No.

Q Now, Robert, did he have a birthday some time around that day?

A Before that happened.

Q Now, you got together at Rebe's house for a celebration because it was his birthday?

A No, we just was there sitting around drinking.

Q When did you start drinking?

A Later on when Robert — when all the fellas got there.

Q Did he start drinking when he got there?

[192]

A No.

Q What time did all the other fellas get there?

A I would say between 5 and 6:00.

Q When everybody else got there, what did y'all start doing?

A Started joking around, just talking, mostly just drinking and that was it.

Q Did y'all play cards or anything of that nature?

A No, we didn't.

Q What room of the house did you stay in?

A The living room. And I did sleep there some time.

Q What room of the house were you in that day when everybody else was there?

A In the kitchen.

Q And where was Ian and Jack?

A In the kitchen.

Q Where was Shelita?

A In the kitchen.

Q Where was Willie?

A In the kitchen.

Q And Willie Leggin, how long did you know him?

A I knew Will about — I would say five years, five to six years.

Q Were you a friend of Will's?

A Yes.

Q Do you know what time Will got there?

A Will got there about — not too long after I got there, which was about, maybe, 4:30, something like that. It wasn't too long after I got there.

[193]

Q Now, did there come a time that you were in the kitchen with Will, Ian, Jack and Shelita, and that Rebe wasn't in the kitchen, she was in the bedroom?

A You left out Rob.

Q And Rob. And Rebe wasn't in the kitchen?

A Uh-huh (affirmative response).

Q And why was that?

A She was in the back with Reggie.

Q About what time did she go in the back with Reggie?

A I'm not sure what time it was, I don't know.

Q Tell me what happened, you're in the kitchen and Rebe was in the bedroom with Reggie, did you ever hear anything outside like a loud noise or anything of that nature?

A A car.

Q About what time was that, do you recall?

A It had to be after 7.

Q Tell me what happened when you heard that car, what did it sound like?

A Sounded like the car needed a muffler on it or either the muffler had a hole in it or something like that. It was real, real loud.

Q Then what happened?

A So I heard — well, I was sitting there and I heard the car outside, so I got up, went to the door to see what car that was, you know, just sitting in front the door like that. As I opened the door, some guys just rushed in with guns demanding [194] that they was looking for money and marijuana.

Q What did they say?

A They said, "Where is the weed and empty your pockets, give up the money. Where is the money?"

Q Now, did you open the door?

A Yes, I did.

Q Was it because somebody knocked or because you wanted to look out?

A I went to look out the door to see what car that was.

Q When you opened the door, what did you see?

A I seen Juan Smith walk through the door with another guy. And that's all I seen come through the door at that time.

Q Who was the first person in the doorway?

A Juan.

Q Did he have a mask on?

A No, he didn't.

Q Do you know if the other people with him had masks on?

A I didn't notice them, I noticed him.

Q Tell me what happened next?

A At this time he's demanding that everybody gets on the floor while he has me at gunpoint.

Q With the Court's permission, would you step down and approach me for a little bit. This is the doorway (indicating), right here by the Court Reporter, you opened the door, where was Juan standing?

[195]

A He was right here.

Q Like this, was he this close to you?

A Yes.

Q How close was he to you?

A Face to face.

Q Face to face. How close were you to him?

A Like this.

Q Then what did you do?

A He had the gun in my head —

Q Then what did you do, show me?

A He said, "Everybody get on the floor. Where is the money and the weed?" like this.

Q How far back did he push you before he put the gun to your head?

A About two steps.

Q Two steps back. Did you see his face?

A Definitely.

Q What's the next thing that happened?

A As everybody was getting on the floor, Shelita, she was still on the phone. I didn't register (sic) what was going through her mind, but she was the last one to get on the floor. And the guy, he just snatched the phone out of her hand and told her to get down, so she got down.

Q What guy did that to her?

A The other guy, he had a gun in his hand.

Q What kind of gun was it?

A AK.

Q What's an AK?

A It's an assault weapon.

[196]

Q How big is it?

A About like this.

Q Let the record reflect your hands are about three feet apart.

A Yeah.

Q And the person that had the AK, was he wearing a mask or not?

A I didn't notice that. My concentration was on the guy that had me. I was trying to see who he was.

Q Who is the guy that had you?

A Juan.

Q What's the next thing that happened?

A At this time Juan has me, I'm standing up with the gun to my head looking out the corner of my eye, trying to see if I could see his face. Then he puts me on the floor. He tells me to get down on the floor. He has a gun on my head. So, the guy with the AK walks to the back door, he opens the door, looks out. At this time I'm still trying to see. I'm on the floor, but I'm still looking up.

Q Who were you looking at?

A I'm trying to see if I could see him, too.

Q The guy with the AK?

A Yeah. I can't see him, so then I'm looking again at Juan's face, trying to see his face at this time 'cause he's just standing up with the gun on my head. So then the guy with the AK comes back, [197] walking through the floor and he says "Get up." I guess he was talking to me, I didn't know. But I'm on the floor, scared to death because Juan had forced me down there saying, you know, to get on the floor, so I just got up and I said, well — and he had the gun under my

chin. At this time I starting peeing on myself, I'm scared.

Q Who had the gun under your chin?

A Juan. A .9mm.

Q That's what he had?

A Yes, it was a silver gun, like this.

Q You know what a .9mm looks like?

A Yeah.

Q A hand gun?

A Yeah.

Q Were you able to see Juan's face then, too?

A Yeah. He was on the side, right there.

Q How close were you to him?

A Right next to me.

Q Then what happened?

A At this time the gun is on me, so I just got smart and looked up at the ceiling. You know, one was saying stand up, one was saying lay down. I said, well, excuse my language, but I said, "Well, what the fuck y'all want me to do?" and at this time, Juan, was like, "You want to be a smart 'lil bitch," and he hit me in the head with the gun.

Q What happened then?

[198]

A I took about two or three steps and I just fell, like I was knocked out.

Q Were you knocked out?

A No.

Q Why did you fall?

A 'Cause he hit me in the head, I just say, well, just fall.

Q Were you in the kitchen when he hit you in the head?'

A Yes.

Q At any time while they were in the kitchen or in the house, did you leave the kitchen?

A No.

Q After he hit you in the head, where did you fall, what part of the kitchen?

A Towards the back door. I actually fell on Will, he was like laying right there.

Q Will was laying on the floor at that time?

A Yes, everybody was.

Q Everybody was?

A Yes.

Q Who is everybody?

A Ian, Jack, Rob, Shelita, and then at this time, me too.

Q What happened then?

A After I fell on the floor, I heard Rebe saying — she comes through, opens the other door that was on the side saying, "Man, what y'all doing?" and I heard one say, "Get on the floor."

Q Who said that?

A I don't know who said it, but one of them demanded [199] that she gets on the floor with us.

Q At this point, Larry, how many people were in the kitchen, how many that were armed perpetrators?

A Three.

Q And who was that?

A Juan was one, the dude with the AK, and they had another guy with a Mack 10, it was a Uzi.

Q What's the next think that happened?

A After he demanded Rebe to get on the floor, she didn't say anything, she just slammed the door and ran. That's when New Years — a lot of shooting.

Q When she slammed the door, what happened?

A When she slammed the door, they just started shooting.

Q What were you doing?

A Just laying there scared to death.

Q Did you wake up?

A No.

Q What were you thinking?

A Waiting to get shot. That's all I could do, just lay there, just scared.

Q How long did the shooting last?

A Minutes, a long time, I don't know. It seemed like it wasn't going to never stop.

Q Where were you when the shooting was going on?

A Just laying on the floor, balled up like in a knot, just terrified.

[200]

Q Who were you laying next to?

A. Will.

Q Were you on Will or what?

A I was by his feet.

Q Did you hear anything besides the shooting?

A No, just the shooting, no screaming, no nothing, just shooting.

Q What's the next thing that happened?

A After the shooting stopped, I heard one of them say, "Come on, man, let's go." So I was just laying there and after I heard the three car doors slam and then I heard a car pull off and I stayed there for like another ten seconds before I moved and then I got up. And as I was getting up, everybody was behind me, so when I stood up, as I was turning around, I said, "Man, y'all alright?" and when I turned around — an ugly sight.

Q What did you see, Larry?

A All my friends was just laying there, all shot up.

Q Who was in the kitchen?

A Me, Ian — no, Ian wasn't in there. It was me, Will, Jack, that's all what was in the kitchen. It was Shelita, too.

Q What did you do?

A Just looked and I ran to Rebe, hollering her name, to see if she was okay, to the back where she was. She was just screaming and hollering. She started [201] asking about everybody.

Q What did you tell her?

A I just shook my head and said, "Rebe, they gone."

Q Did you see your friend, Robert?

A Yep, looking at me.

Q Where was Robert?

A In the living room, in the next room with another guy I didn't know.

Q What happened after that?

A After I got Rebe, I kept running through the house trying to find out, you know, if somebody was breathing or whatever. Shelita said, "Larry," so I ran to her. And she said, "Larry" and I said, "Shelita, you was shot?" she said, "Yeah." I said, "Where at?" and she said, "In my arm and in my leg." Right then I said, "Well, you're going to be okay then." She said, "Larry," I said, "What?" and she said, "Feel like I'm about to die." And I said, "Shelita, don't say that. You're going to be alright."

Q She was in the kitchen?

A Yeah.

Q What did you do then?

A I told Rebe to call the ambulance and the police. And I went back through the house, still looking

at everybody and I noticed one of the guys that I had never seen before and I asked Rebe, I said, [202] "Do you know him?" and she grabbed me, no, she was scared. So I ran back in the kitchen and I reached behind the refrigerator when I knew they had a gun, a shotgun, I grabbed that and I ran back to them and I held it over his head and I said, "You was one of them came in here, huh?" like that. I cocked it and as I was about to pull the trigger, Rebe grabbed me, screaming, "No, Larry, no, no." So I just took the gun and put it in the bathroom.

Q What did you do after that?

A I came back to the guy and I kicked him about three times in his side. At this time all the police and everything started coming.

Q Did you lose your best friend that day, Larry?

A Yes.

Q Who was that?

A All of them really.

Q Those were your friends?

A Yeah.

Q What happened after that to you?

A I started having dreams, nightmares about what happened. Seeing different people laying on the floor dead and all those kind of things, so I couldn't sleep. I wound up walking off my job.

Q At Xavier?

A Yep.

[203]

Q They took you back?

A Yeah.

Q What else happened to you?

A I wound up in a hospital because I had started drinking heavily to get some sleep. So I admitted myself into substance abuse and tried to get some grief counseling and all that kind of stuff.

Q Now, you drank alcohol before March 1, didn't you?

A Yeah, but not as much as I drank after that happened.

Q After March 1 — I'm going to back up a little bit, okay. Before June, did Detective Ronquillo show you a set of photographic lineups?

A Yes, he did.

Q He showed you a series of three lineups on March 13 on Touro Street at Rebe's house, is that right?

A No, it was Bert's house.

Q Who is Bert?

A My friend's mother.

Q Is that where you saw the photographic lineup?

A Yes.

Q Out of those three, did you make any identification?

A No.

Q Again, two days after that, you saw another couple of photographic lineups, is that [204] right?

A Uh-huh.

Q Did you make any identification?

A No, I didn't.

Q Did you see the person that shot?

A No.

Q And after that you saw some more photographic lineups, is that right?

A Yes, I did.

Q On March 20. Whose house would that have been?

A Same house.

Q Bert's?

A Yes.

Q On Touro Street?

A Yeah.

Q Did you make any identifications from those photographic lineups?

A No, I didn't.

Q And finally on the 29th of March you were shown three more photographic lineups, I believe, did you make any identifications from those lineups?

A No, I didn't.

Q Whose house would that have been?

A Same house.

Q Bert's?

A Yeah.

Q You made no identifications?

A None.

Q In one of those photographic lineups, the eighth lineup you were shown, did you [205] point out any individual or any characteristics on an individual?

A They had a picture of a guy that had his hair cut similar to the way Juan keeps his cut.

Q Larry, I'm going to ask you to look over here for a second, was that the way Juan had his hair cut on March 1?

A Yeah, but the top was a little bit lower.

Q But it was shaved on the sides like that?

A Yes.

Q Now, when you saw this photograph, what did you tell the detective?

A I told the detective he had a haircut like that and the look that he had on his face was the same look that Juan gave me when he came through the door.

Q You didn't identify this individual?

A No, I didn't.

Q In fact, did you tell the detective that that was or was not the individual?

A I didn't say anything like that.

Q Did you say he wasn't the guy?

A I said it wasn't him.

Q I'm going to show you what I'm going to mark at State's 131A, previously shown to Defense Counsel. Do you remember that photograph?

A Yes, I do.

Q Is that the haircut?

A Yes, it is.

Q Is that the smirk?

[206]

A Yep, but it would have been angrier than that.

Q Let me draw your attention to June of this year. Did there come a time that you had occasion to look at the Times Picayune and see any photographs?

A (No verbal response.)

Q Did you look at the Times Picayune and see some photographs?

A Yeah, I did.

Q Tell me how that happened.

A On this particular day I was at work and I was just working and I overheard on the radio that they had caught the guys that —

MR. LARRE:

Wait, wait —

THE COURT:

One second, approach the Bench.

(AT WHICH POINT AN IN-CAMERA DISCUSSION WAS HELD)

BY MR. JORDEN:

Q Larry, did there come a time when you had the occasion to look at the Times Picayune and see four pictures on the front page?

A Yes.

Q Was that approximately June 7 of this year?

A Yes, it was.

Q Where were you when you looked at that Times [207] Picayune?

A I was at home.

Q Did you go get the paper or did it come to your house?

A I went and got it.

Q Then what happened next?

A I looked at the paper.

Q Where did you look at the paper?

A At home. After that I just looked at it and kept looking at all of the pictures. And I took the paper and I just threw it on my bed and I left.

Q When you first looked at those pictures, were you able to identify anyone?

A When I saw Juan's face, yeah.

Q How long did it take you to make that identification?

A Soon as I looked at the pictures.

Q Which picture was it of the four that was in there?

A The third picture.

Q Was there any doubt in your mind?

A None.

Q Were you positive?

A Positive.

Q How long did you look at the pictures after you knew that was the person?

A Ten minutes.

Q Why did you keep looking at it?

A 'Cause I was just hoping that I could find him one day.

Q I'm going to show you what I'm marking as [208] State's Exhibit 146 and ask if you can identify that?

A Yes, I can.

Q What is that?

A That's his picture right there.

Q Which picture is Juan's picture?

A The third picture.

Q Those other three pictures, are those the same three pictures that you saw in the newspaper that day?

A Yes, sir.

THE COURT:

At this point, approach the Bench. Let's see the photograph.

(DISCUSSION OFF THE RECORD)

THE COURT:

Ladies and gentlemen, it has been stipulated so that I would comment, is that correct, Mr. Larre?

MR. LARRE:

Yes, Your Honor.

THE COURT:

Is that correct, Counselor?

MR. JORDEN:

That's correct.

THE COURT:

[209]

The photographs you see here is an array of photographs that appeared in the Times Picayune on June 7, 1995, depicting possible suspects of the March 1 incident that happened on North Roman Street. There is an agreement to that stipulation that I make that comments, is that correct?

ALL COUNSEL:

Yes.

BY MR. JORDEN:

Q What did you do after you saw that picture?

A I left the house and just started roaming, just walking. Two days after that I just left town.

Q Why did you leave town?

A 'Cause I had called up a friend of mine and he told me Juan was still on the street somewhere.

MR. LARRE:

I object to that.

THE COURT:

Objection overruled.

BY MR. JORDEN:

Q Is that why you left town?

A Yeah, I was scared.

Q You didn't call the police, did you?

[210]

A I just left.

Q Where did you go?

A To Mississippi.

Q Where did you go in Mississippi, without stating the town or anything, whose house did you go to in Mississippi?

A A girlfriend of mine.

Q How long did you stay there, Larry?

A Two weeks.

Q Why did you come back?

A 'Cause at this time my mother was looking for me and they told me that they had caught Juan and I needed to come back to testify against him.

Q Did you come back?

A Yes, I did.

Q During this time did you have any problems with drinking?

A Not really.

Q During the time after the March 1 incident?

A Yes, I did.

Q That's when you started having problems drinking?

A Started having nightmares and started drinking a lot.

Q Did you do anything about that?

A After I came from Mississippi, I went to Charity Hospital.

Q How did you wind up going to Charity Hospital?

A One night that I was crying, I just went to my mother. She said, "Larry, you need [211] to quit all that drinking." I said, "Ma, I need help. I can't sleep." She said, "Well, I'll take you to the hospital."

Q Why couldn't you sleep?

A Because of what happened to my friends while I was there. I was just having nightmares. I still do from time to time.

Q How long did you stay in Charity Hospital?

A I stayed in there a week.

Q Do you remember about what date you went in there?

A June 26.

Q Two days before Detective Ronquillo met you?

A Yeah.

Q And you admitted yourself?

A Yes, I did.

Q On June 28, did you have the occasion to meet with Detective Ronquillo at Charity Hospital?

A Yes.

Q Where did you meet with Detective Ronquillo?

A In one of the offices.

Q Who was present when you met with Detective Ronquillo?

A One of the nursing staff members.

Q The Detective and you?

A Yes.

Q Were you on any medication when you met with the Detective?

A No, I wasn't.

[212]

Q Were you having withdrawals from alcohol or anything of that nature?

A No, I wasn't.

Q Were you sober?

A Yes, I was.

Q Did the Detective show you any photographs?

A Yes, he did.

Q How did he give the photographs to you?

A He laid them out on the table and pulled out a batch of pictures and I think he was like four and six, or five and six, something like that. He showed me those and I noticed in the first bunch, Juan was in that one. Then he put those up and showed me some more.

Q The first set of photographs that you saw, you made an identification?

A Yes, I did.

Q How quickly after you saw these photographs did you identify Juan Smith?

A As soon as I seen Juan's face. I'll never forget Juan's face, never.

Q Did you sign the back of that photograph?

A Yes, I did.

Q Did you initial the rest?

A Yes, I did.

Q Did the police officer tell you who to pick out?

A No, he didn't.

Q Did he force you to pick out anybody?

A No, he didn't.

Q Now, those next two photographic lineups, you [213] didn't make any identifications from those, is that correct?

A No, I didn't.

Q I'm going to show you what's been marked as State's 136 and I'm going to ask you if you see the photograph that you picked out.

A That one.

Q Turn that photograph over, Larry. Is that the one you signed?

A Yes, sir.

Q What's the date on that?

A June 28, 1995 at 2:55 pm. I signed all that.

Q And that's Juan Smith?

A Yes, it is.

Q Did you initial the rest of these photographs?

A Yes, I did.

Q Put the date and time on them as well?

A Yes, I did.

Q Larry, do you see the person in the court today who barged through that door that day and put a .9mm to your head?

A Yes, I do.

Q Point him out for the Jury.

A He's right there. Like I say, I'll never forget him.

Q The gentleman in the multi-colored shirt?

A Sitting over there like a 'lil gangster, like this (demonstrating).

[214]

MR. JORDEN:

Let the record reflect the identification of Juan Smith.

BY MR. JORDEN:

Q Let me just ask you now, the man you just pointed out, did you notice anything else about his character when he came in the house that day?

A Mouth full of gold.

MR. JORDEN:

At this time, Your Honor, I would ask that Juan Smith show his teeth to the Jury.

(DEFENDANT COMPLIES)

BY MR. JORDEN:

Q Larry, is that the mouth full of gold that you saw come in with a gun that day?

A Same mouth.

Q Same face that came in the door that day?

A Same face.

Q Same person that hit you on the back of the head that day?

A I would like to him back. Yes, sir.

Q Larry, is there any doubt in your mind whatsoever, any doubt at all, that Juan Smith is the man that came to the door that day at 2230 North Roman Street?

A No doubt.

[215]

MR. JORDEN:

Your Honor, I'd tender the witness.

THE COURT:

Tendered to you, Mr. Larre.

CROSS EXAMINATION

BY MR. LARRE:

Q Mr. Boatner, on March 1 when you went into that house, you were there with grown adults who were drinking and smoking marijuana, is that correct?

A No, sir.

Q Nobody was smoking marijuana?

A They had just started smoking marijuana They was just drinking.

Q Did you smoke marijuana?

A No, I didn't.

Q Never did?

A Yes, I have before, but not that day, not that night.

Q Not that day?

A No, sir.

Q Now you testified you got at that house around 3:30, is that correct?

A Uh-huh.

Q And you started drinking around 5?

A When all my friends got there.

Q And y'all were drinking what?

A Old English 800.

Q Is that a beer or an ale?

[216]

A Beer, malt liquor.

Q Malt liquor?

A Yes, sir.

Q How does that come?

A Bottles, you can buy the cans.

Q Quart bottles?

A Quart bottles, 48 ounce bottles, 16 ounce cans.

Q What do you usually drink?

A Most of the time the 48 ounce bottle, but we was drinking out of a bottle. We were sharing.

Q You were sharing a 48 ounce bottle?

A We were sharing a 64 ounce bottle.

Q How many of those did you drink during the course of from 5 to 8:30?

A I drank two cups.

Q Two cups?

A Two cups of beer, that's all the beer we had.

Q That's all the beer you had?

A Yep, we was counting money to try to get some more.

Q And there were five of y'all and y'all were counting money to buy another bottle of beer.

A Yeah.

Q Now you testified that you were in the kitchen and you heard a noise and you went to the door?

A Yes, sir.

Q Nobody knocked on that door?

A No.

[217]

Q Somebody came in that door and said get down on the floor?

A Yeah.

Q Is that correct?

A Yes, sir.

Q How fast did that happen?

A Seconds.

Q And when that person came in, they didn't walk in like this, they came rushing in, is that correct?

A Yes, they did.

Q And when that person who did this to you, you should Mr. Jorden how he grabbed you and put a gun to your head?

A To my face first.

Q To your face?

A Yes, sir.

Q And when you looked at that person —

A Face to face.

Q Face to face, was he the same height as you?

A No.

Q Was he taller than you?

A No.

Q He's not?

A Face to face, Juan is not that tall and he's not that short.

Q Is he the same height as you, face to face?

A Not the same exact height, but I seen him face to face. I'm looking him dead in his eyes.

Q But you saw him stand up just now, so you know how tall he is?

[218]

A Not really.

Q Do you think he's shorter than you?

A He might be, might be taller. I don't know.

Q What did you tell the policemen, you gave them a description? Tell me what you told the policeman.

A I described him as he was in my face, the way I seen him.

Q Well, what did you tell the policemen, what did you see?

A I told him about how the hair was and I told him about the golds in his mouth.

Q The golds in his mouth?

A Yes, sir.

Q And that's what you remember?

A I remember his face.

Q You remember his face?

A Yes, and that he was heavy, like built.

Q Heavy built?

A Yeah.

Q But did you tell the policeman that he was short, tall?

A Not to my knowledge.

Q Now you picked out a person almost four months after the incident because of the golds in his teeth and the hair on his head. Do you see any golds in his teeth in this picture?

A No.

Q Do you see any golds in his teeth in this picture?

A No, I don't.

[219]

A No.

Q And then you said they had another person in the house that had a .9mm gun?

A Juan had the .9mm.

Q What kind of gun did the other person have?

A A Uzi.

Q And you know all about these guns?

A Yeah.

Q And how do you know about these guns?

A Seeing them on the movies.

Q What kind of gun did you get convicted of having?

A A .380.

Q That's an automatic weapon, too?

A Yes, it is.

Q You said that you weren't on probation?

A Not at that time.

Q No, you hadn't been convicted at that time. You got arrested on February 27, is that correct, of this year?

A Nope.

Q February 5 —

MR. JORDEN:

Your Honor, may I approach the Bench?

(DISCUSSION OFF THE RECORD)

BY MR. LARRE:

Q We'll withdraw that. So, at the time that this happened, you had been convicted of [220] a battery and you got 90 days?

A Yes, sir.

Q And then you had been arrested for a gun, which was an automatic weapon, on February 5?

A 6th.

Q The paper says the 5th?

A It's wrong.

Q Well, you got arrested on the 6th and then you pled guilty and you were convicted, is that correct?

A Yes, I was.

Q And that would have been on March 23?

A Yeah.

Q And as part of your probation, you were required to go to the —

MR. JORDEN:

Your Honor, I would object to this line of questioning. This is improper.

THE COURT:

Let's see. You got to lay a foundation before you do that, it says it here.

(DISCUSSION OFF THE RECORD AND IN-CAMERA DISCUSSION)

BY MR. LARRE:

Q March 23, that's when you first got your pobation for the wapon and as part [221]

THE FOLLOWING IN-CAMERA DISCUSSION TOOK PLACE DURING THE CROSS-EXAMINATION OF LARRY BOATNER, ON PAGE 220 AFTER LINE 28

THE COURT:

Let the record reflect that we're in my chambers outside the presence of the jury for the purpose of entering a motion, or some discussion with Defense Counsel, in reference to —

MR. LARRE:

An objection by the State to my question.

MR. JORDEN:

Your Honor, the State's objection is that Mr. Larre is going beyond what the court authorizes on impeaching a witness on conviction. In fact, the State brought out on direct-examination that which is

authorized by the Code, the fact that there is a conviction, what the conviction is for, when he was convicted and how much time he got. Anything beyond that, I believe is beyond the Code.

Now, if the witness denies his conviction, that's when an examiner is allowed to delve into the particular facts surrounding that conviction and other particular instances.

THE COURT:

You want to talk about probation; is that right?

MR. LARRE:

No, no. Judge, what I'm saying to the [222] Court is that they can't have their cake and eat it, too. They want to bring this man onto the witness stand, and they're going to say, 'okay, you had a gun and you beat somebody and you got convicted. But, you're this poor victim who has nightmares and had to put youself into a detox unit and you're clean.

But, when we get the court records that show that part of his probation for carrying an automatic weapon, was to report to Target Cities —

THE COURT:

You don't have anything in the records that says that he didn't report to Target Cities.

MR. LARRE:

I have indications in the record.

THE COURT:

You have nothing in the records —

MR. LARRE:

Well, you didn't read the whole thing.

THE COURT:

Well, let's see what you've got. What I see is that he was arrested on another charge, which was a battery charge.

MR. LARRE:

Yes, sir.

THE COURT:

And, that automatically puts a probation hold on the defendant. And, Ms. Surgi (phonetically) recommended that [223] he would not be violated. So, what you're contending is not the truth.

MR. LARRE:

But, there are many more entries after that.

THE COURT:

I don't see any after that. You're looking at them backwards.

MR. LARRE:

But, what I'm suggesting to the court is that once they open the door to his character, I have a right to delve into —

THE COURT:

Is Ms. Surgi in the building?

MINUTE CLERK:

She left, Judge, but I can beep her back.

THE COURT REVIEWS THE COURT RECORD.

THE COURT:

I see that it says "Not recommended to be revoked and placed back on probation."

MR. LARRE:

Yes, sir.

THE COURT:

So that's indicative — those things are not sacrosanct, the minute entries. They're only an abbreviation of the law processes that take place. And, it seems to me that it's more similar to a situation where he's arrested on a new charge, but it's a misdemeanor. It's a misdemeanor in this case, and his probation officer placed [224] him back on Target Cities on Intensive Probation.

MR. LARRE:

Let me ask the Court this: They have put into evidence, they have, that he has a substance abuse problem; that he was hospitalized for it. Can I delve into how he maintained his treatement in the substance abuse program run by this court? Can I ask him those questions? They opened that door, not me.

THE COURT:

I'm going to let you ask those questions.

MR. LARRE:

I'm satisfied with that.

MR. JORDAN;

Your Honor, I'd like to know what perimeters Mr. Larre is going —

MR. LARRE:

Well, I'm going to ask him if he did participate in the court program of substance abuse, did he make his meetings, did he do what he was supposed —

MR. MENNER:

How do you know he was ordered to do that?

MR. LARRE:

He was ordered to go to Target Cities.

THE COURT:

Well, that's a fact of life, that's the way it works. We can always get the lady [225] here, but that's the way it is.

MR. LARRE:

I can question him about that.

THE COURT:

I'm going to let him do that.

MR. JORDAN:

Your Honor, my objection is that I think the insinuation is that perhaps Larry Boatner had substance problems before this happened.

MR. LARRE:

Well, we're going to ask him.

THE COURT:

The facts are going to be whatever they are. He's subject to cross-examination. I'm not going to limit his cross-examination.

MR. JORDAN:

Is that the limit of Mr. Larre's examination regarding that conviction?

THE COURT:

He's got convictions. Let him talk about those convictions. But, you opened the door about this substance abuse problem. I can't put handcuffs on him to say that he can't cross-examine him on that particular area.

If there's another area, that's something different. If there's another area, we'll revisit it again.

Let's do it.

[226]

of that probation you were ordered to to to Target City, is that correct?

A Yes, sir.

Q Tell the ladies and gentlemen of the jury what Target City is?

A It's a drug program. You go to a drug and alcohol program. You go on Saturdays and talk about different things.

Q And you were required to do that in March and did you make all of the meetings you were required to make?

A No, I didn't.

Q You did not?

A I did not.

Q How many did you miss?

A I believe it was two.

Q Two. And when were those?

A One was, I believe, after March. I don't recall. I know I did miss two.

Q And you were receiving counseling for substance abuse as a result of that probation, is that correct?

A Yeah. I wasn't allowed to use any drugs or alcohol while I was on probation.

A And did you use drugs and alcohol while you were on probation?

A No, I didn't. The only time I used it, after the incident.

Q Well, you got probation after the incident, is that correct? The incident happened on March 1 and you got probation on March 23?

[227]

A Yeah.

Q So you used drugs and alcohol —

A I only used alcohol because after a while I couldn't do nothing, couldn't sleep, so I started drinking.

Q And when did you start drinking?

A It was before the probation.

Q And you continued to drink while you were on probation?

A No, I didn't.

Q Well, in June you were on probation, is that correct?

A Yes.

Q And you were using alcohol in June when you put yourself in the hospital?

A Yes, I was.

Q So, you were using alcohol when you were on probation?

A Yeah, because I started having the nightmares again.

Q And when you got this battery conviction, this conviction for battering somebody, that was also while you were on probation?

A No, sir.

Q It was not?

A It was not.

Q When was that?

A That happened the same night. The only thing they did, they separated my charges. I got — I received both — those both at the same time, but they separated them.

[228]

Q So you now in a substance abuse program, but you still were abusing the substance and you put yourself in a hospital?

A Yes, I did.

Q Now, let's talk about the night that this happened. When you were there in the kitchen with these people, you knew that there was a gun behind the refrigerator, is that correct?

A Yeah, I did.

Q And that was a shotgun?

A A shotgun.

Q And you knew where it was and you knew it was loaded?

A I didn't know if it was loaded or not, I knew it was there. Even after I held it over the guy's head, I still don't know if it was loaded.

Q And you knew that Robert Simpson had a gun — it is Simmon?

A Simon. Robert Simon.

Q You knew he had a weapon?

A I didn't know at the time. I knew he use to always carry one. I didn't know if he had it on him then or not.

Q Did you know that Reggie had a weapon?

A No, I didn't.

Q Now, when you opened that door, you had to unlock that door, is that correct?

A The door was open, all I had to do was open it.

Q You just had to pull it?

[229]

A It wasn't locked.

Q It wasn't locked?

A It wasn't locked.

Q And these people came barreling in and you ended up on the floor?

A Everybody else was on the floor before me.

Q Everybody else was on the floor before you?

A Yeah. At this time I was held standing up at gunpoint.

Q You were held standing up at gunpoint —

A While everybody else was demanded to get on the floor, yes, sir.

Q You didn't get on the floor at the same time as them?

A No, I didn't.

Q Now let's talk about this injury that you sustained. How many stitches did you get in your head?

A Four.

Q And when was that done?

A The same night that happened.

Q And they hit you in the head and opened your head?

A Split it open.

Q Did you get dizzy?

A No.

Q Not at all?

A No.

Q And you never lost consciousness at all?

A No, I didn't.

Q And you never knew Juan Smith before?

A Never.

[230]

Q Never?

A Never.

Q But you know him and you call him Juan continuously.

A Hearing his name all the time after he was caught, yes.

Q You testified to something that's interesting. You said that you cam back here on June 21, was it?

A June 21?

Q When you went to Mississippi, you came back when?

A It was something around there. It was the weekend, a Saturday, the 24th, I believe.

Q The 24th?

A Yeah, because that Monday was the 26th when I admitted myself in the hospital.

Q So you came back on a Saturday and you went into the hospital?

A Monday.

Q Monday, two days later?

A Yeah.

Q But during the time from January the 7th when this newspaper article came out —

A June.

Q June, I'm sorry, June the 7th and June 24th when you came back home, you never called Officer Ronquillo and said, I know who did this?

A No, I didn't.

Q You never attempted to call?

[231]

A No, I didn't. I was just scared.

Q You were scared?

A Scared.

Q And the reason you were scared is because Juan Smith was still out on the streets?

A Yes.

Q But you never called Ronquillo to tell him that was Juan Smith so he could be arrested?

A No, I didn't.

Q And you came back because of why?

A Because after he was caught, then I came back.

Q After he was caught?

A After he was caught I came back.

Q How did you know he was caught?

A I received — I called and they said that he was caught.

Q Who did you call?

A I called by Bert's house.

Q By Bert's house?

A Yes, sir.

Q Well, I thought you told the District Attorney your mother called you and said Juan had been caught?

A No, my — I never said that.

Q You never said that just now?

A My mother never told — my mother never even was involved with all this.

Q She wasn't involved at all?

A No.

[232]

Q And you're sure you never said before when the court reporter took it down that your mother said it?

A My mother never told me Juan was caught.

Q So Bert's house called and told you?

A I talked to her oldest son, he's the one that told me that I needed to come because they had caught Juan.

Q You need to come because they had caught Juan?

A Yes.

Q And who was that person?

A (Inaudible response).

Q Who?

A Leonard.

Q Leonard who?

A Harris.

Q And who is he now?

A That's Bert's son.

Q Who is Bert?

A Right over there.

Q And is Leonard here?

A No.

Q His Dad's here?

A No.

Q You said Bert's over there. Is Bert a lady?

A Bertha, that's his mother.

Q His mother. When did you call and find that out?

A That weekend.

Q The weekend that you came home?

[233]

A Yep.

Q And you came home on Saturday, but you talked in Mississippi that weekend?

A Uh-huh.

Q Did you hang up the phone and come straight home?

A No.

Q Tell me what you did.

A I didn't do anything, I just waited. Her son came and got me, Louis.

Q Louis came and got you?

A Yes.

Q And is he here to testify to that?

A No.

Q So Bert called you up and said you could come home because Juan has been arrested.

A No.

Q You called Bert up?

A I called —

Q You called —

THE COURT:

Let him answer the question.

BY MR. LARRE:

Q You called?

A I called and I spoke with Leonard. He told me that Juan was caught, that I needed to come down and testify. So, I waited for Louis and Louis came and got me and here I am.

Q And Louis is who, now?

[234]

A Louis?

Q Louis.

A That's her other son.

Q Her other son?

A Yes.

Q And have you seen him today?

A No, I haven't. I haven't seen Louis in a few days.

Q Did the tell the District Attorney and the police that Lenny told you that Wayne had been caught?

A No, I didn't.

Q Did you tell the District Attorney or the police that Louis came to pick you up from Mississippi?

A No, I didn't.

Q And you didn't think that was important that they might want to be witnesses?

A No.

Q What all did you tell the District Attorney about when you came home?

A I didn't speak to him then.

Q You never spoke to the District Attorney?

A I went to the hospital when I got back.

Q Did you tell Mr. Ronquillo?

A No.

Q That's the policeman, huh?

A I seen him at the hospital when he came with the pictures asking me about did I notice anybody in those lineups and that's when I picked out Juan.

Q When is the first time that you told Mr. [235] Ronquillo that you saw the newspaper article?

A I don't recall.

Q Did you ever tell him?

A Not that I know of.

Q So you picked out a person that you knew who it was because you had seen him in the newspaper, but you didn't tell the policeman?

A I picked out the person I seen come in that house that held a gun to my head and under my chin and the person that was there when all my friends died.

Q Okay. But the question I asked you is, you saw this picture and made up your mind it was Juan Smith, right?

A I knew it was Juan when I seen it.

Q You knew it was Juan?

A Yeah, I knew he was the guy.

Q But the person that came into the house you never knew his name, huh?

A I never knew his name, no.

Q You never met him before?

A Never.

Q But you knew it was Juan Smith?

A Yeah, after looking in this paper, his name was right under the picture.

Q Because his name was there?

A Yeah.

Q But you remembered his name?

A Juan.

Q Did you tell the police officer when you [236] looked t these six pictures and you picked this picture out that this was Juan, did you say this is Juan?

A I said that's the guy.

Q That's the guy?

A Yeah.

Q But you never told him that you knew his name because you saw him in the newspaper?

A Just pointed out the picture and said that's the guy.

Q But you never told the policeman that you saw this person in the paper —

THE COURT:

You're beginning to be redundant, you just asked him that question.

MR. LARRE:

I was just trying to clarify it.

THE COURT:

He's answered the question. Asked and answered.

BY MR. LARRE:

Q Now, when you came to court, you came to court before, is that correct?

A Yes.

Q Do you remember coming to court on October 27?

A Yes.

Q And in this courtroom, I was here and I [237] asked you some questions about that identification?

A Uh-huh.

Q And at that time when you were on the witness stand, under oath, you never ever mentioned seeing this picture?

A It never came up.

Q Do you remember me asking you questions?

A Yes.

Q And do you remember him asking you questions?

A About the lineup, yeah.

Q And I asked you to tell me how you picked out that picture, is that correct?

A Yes.

Q And I asked you in detail how you recognized that person, correct?

A Uh-huh.

Q And I asked you did you recognized his height and his weight and his facial features, is that correct?

A Uh-huh.

Q But you never thought it was important to tell me that you saw this picture?

A You never asked me.

Q I had no way to know. Now, in the time before October 27, when you talked to the District Attorney before you got on the witness stand, did you tell him?

A About what?

Q About seeing this picture.

A I told him about that picture there.

Q Only about that picture?

[238]

A To my knowledge, yes, sir. That's what he asked me, how did I identify him.

Q How did you identify him?

A That picture.

Q You identified this picture?

A That picture.

Q And at that time on October 27, when I was questioning you, did you, in fact, at that time point to my client and say, he's Juan?

A That's him.

Q Did you call him by name?

A I might have, I don't remember.

Q You don't remember. You don't remember me asking you how you knew his name?

THE COURT:

Let's see that before you ask the question. Page and —

MR. LARRE:

What I'm referring to is the transcript of October 27.

THE COURT:

Let's see the page and let's see what we're talking about.

MR. LARRE:

I'll come back to that, Your Honor.

BY MR. LARRE:

[239]

Q Now, is it your testimony that the only you know this man's name is Juan is from this picture?

A In here and I heard his name even while I was incarcerated.

Q When you — on June 7 before you bought this newspaper, did someone call you on the phone and tell you go get the newspaper?

A No.

Q They did not?

A I believe I called him. I don't remember if he called me or I called him.

Q How could you call him if you hadn't seen the newspaper?

A (No audible response).

Q Did you testify earlier today in a hearing in the Judge's chambers that you went and got the newspaper because a friend had told —

THE COURT:

Let's see —

MR. LARRE:

That's not in this transcript, that hasn't been transcribed.

THE COURT:

That's what I want to see and that's what I want to have some discussion about. Let's see what you're talking about.

[240]

MR. LARRE:

We have to get it from the court reporter, it hasn't been transcribed.

MR. JORDAN:

Your Honor, I have no objections at this point.

BY MR. JORDAN:

Q Is it not a fact that when we were in chambers this morning and we were questioning you about this newspaper article because it came up and we talked to you about it today — yesterday, I'm sorry. When we talked to you about this newspaper article yesterday, did you not say that somebody called you?

A Somebody called me, uh-huh.

Q And who was that that called you?

A Louis

Q And that's the person who went to get you in Mississippi?

A Yes.

Q And Louis told you to look at these pictures?

A To see if I recognized any of them.

Q And did Louis mention the name Juan?

A No, not until after I got the paper and saw it and pointed him out and said yeah.

MR. LARRE:

Your Honor, we'd refer the Court to page 22, line 22.

[241]

(DISCUSSION OFF THE RECORD)

BY MR. LARRE:

Q Sir, do you remember in October you referred to my client ass Juan?

A October?

Q October 27 when you were on this witness stand, do you remember that?

A Yeah.

Q Do you remember me asking you did you know him before?

A No, I didn't.

Q You don't remember that?

A No.

Q And when I was talking to you at that time, we were talking about the first picture you looked at that wasn't identified by you, is that correct?

A That first picture?

Q Yeah. The picture that you said was similar.

A No.

Q When you looked at this picture, you said that wasn't him?

A Yes, sir, I did.

Q But he had a similar haircut and similar facial features?

A The look.

Q And when I was questioning you about that, when I asked you was that the person who hit you with the gun, did you respond, "He had his hair the same way as Juan, but it wasn't him," do you [242] remember that?

A No, I don't.

Q You don't remember saying he had his hair the same way, but it wasn't Juan?

A No, I don't.

MR. LARRE:

Your Honor, I refer you to page 22 where I asked the question and he says —

MR. JORDAN:

My only objection is I don't see any inconsistencies.

THE COURT:

Approach the bench.

(DISCUSSION OFF THE RECORD)

BY MR. LARRE:

Q How did you determine that it was Juan on that date, was it because of looking at the picture?

A On what date?

Q In October.

A When I came in?

Q Yeah, how did you determine it was Juan?

A I already knew his name. I had been hearing his name since he had been caught, since the photo.

Q But you never said anything back in October [243] about seeing that picture?

A I never was asked about it.

Q Now, when you went into this house that night, you knew that they were selling drugs out of that house, is that correct?

A Uh-huh.

Q You knew the people had guns in there?

A I knew the shotgun was in there.

Q You knew that Robert had a gun?

A I didn't know, but I knew he sometimes carried one.

Q What kind of gun did Robert sometimes carry?

A .25 automatic.

Q And when you heard all that noise and opened that door, did you know people were coming in to rob that house?

A Nope. I wouldn't have never opened the door, I tell you that.

Q You've never seen Juan Smith other than in court and allegedly at the time that the people were killed?

A Yes.

BY MR. LARRE:

I have no further questions.

THE COURT:

Tendered back to the State.

MR. JORDAN:

I have no questions.

TESTIMONY OF REGINALD HARBOR

DIRECT EXAMINATION

* * * * *

[244]

BY MR. MENNER:

Q How old are you, Mr. Harbor?

A I'm 35.

Q And, are you from New Orleans?

A I was born in New York.

Q And, how long have you lived in New Orleans?

A For 30 years.

Q And, can you tell the jury how you lost your legs?

A I was struck by a drive-by shooting.

Q And, how long ago did that happen?

A Two years ago.

Q And, where were you struck; in your legs?

A In the lower abdomen, to the right — on the right side. It went through and shattered my left pelvis.

Q And, what type of work did you do before you were shot?

A I was in the lodging business, hotel-motel hospitality.

Q And, what type of work, specifically?

[245]

A I worked in the public areas, lobby areas, janitorial.

Q And, what type of extracurricular activities are you involved in now?

A Right now, I play wheelchair basketball for the Road and Reiners (phonetically) of New Orleans.

Q Now, Mr. Harbor, let me ask you if you know Rebe Espadron?

A Yes, I do.

Q And, how did you meet her?

A I met her at a parade through Shelita's father.

Q And, that was during Mardi-Gras?

A During Mardi-Gras, yes.

Q Was that this year, 1995?

A Yeah.

Q And, what was the nature of your relationship?

A Typical — you know, typical relationship thing.

Q Dating?

A Dating, yes.

Q Now, I want to bring you to March 1st of 1995, Ash Wednesday of this year, the day that everyone was shot. How long had you known Rebe on that day?

A I met her during the Bacchus parade.

Q That would have been the Sunday before Ash Wednesday?

A Yes.

Q So you had only known her a couple of days?

A Yes.

Q Did you know she was selling drugs?

A No, I didn't.

[246]

Q Did you know any of her friends?

A No, I didn't.

Q Now, what time did you go to the house on North Roman?

A It had to be around 6:00 or 6:30.

Q And, how did you get there?

A I caught a cab.

Q And, do you remember who was there when you first went to the house?

A Yes, I do.

Q And, who was that? Did you know those people?

A No, I didn't know them, but, now I do.

Q Now?

A Yeah.

Q But, at the time, you had never seen any of those people?

A No.

Q Well, what did you do at that point, when you first walked into the kitchen?

A I walked in the kitchen. They had a guy sitting on the counter top and they had another guy sitting at the table. Shelita and Rebe escorted me into the house.

Q Had you met Shelita before that?

A Yes, I had.

Q And, when did you meet Shelita?

A Through her father, at her father's house.

Q Now, what did you do there? You stayed in the bedroom, you said? What did you and Rebe do at this point?

A What did me and Rebe do? We went straight through the house, all the way to the bedroom.

[247]

Q And, what did you all do there?

A Lounged.

Q And, where were you at 8:30?

A In the bedroom.

Q And, where was Rebe?

A In the bedroom.

Q And, do you know if there was anyone else in the bedroom?

A No, wasn't no one else in there.

Q And, at what point did you hear anything unusual?

A It had to be — Sister, Sister was on t.v. when I heard something unusual. And, I said, "Rebe, what's that noise in there?"

Q And, what did that noise sound like?

A Sound like wrestling. It sounded like a wrestling noise.

Q Okay. And, what did Rebe do?

A And, she was in the mirror combing her hair. And, she stopped and went to go see. And, I'm just sitting there. And, the next thing you know, she came, like, she coming back — she came back to the room like, hysterical like. Then, I heard a pop, "Pop", you know.

Q And, what did you do then?

A Well, you know, I like — like, you know, I thought they were probably clowning around with some fireworks or something. So, she like, broke to the corner, you know, like, hysterical like. And, then, the next thing I heard was something go "Pop, pop, pop, pop, pop, pop. Pop, pop, pop, pop, pop, pop." Then, I dove on the floor. I was on the floor. I tried to get [248] under the bed, but the bed was too low to the floor, you know. And, so I jumped up and me and Rebe — I, you know, got in the coner with Rebe in that hallway. It was like, I'm terrified. Oh, man.

Q Were you armed at that point?

A Pardon me?

Q Did you have a gun?

A Yes, I did.

Q What did you do with that gun?

A Well, when I dove on the floor, I left the gun in my wheelchair, in my pouch. And, she like, Rebe, like, pointed, was pointing at my gun, you know. And, all this shooting, that gun wasn't 'gonna do no good, you know. So she was pointing at the gun. So I jumped up and I grabbed the gun and we backed — I backedback into the corner with Rebe. She was behind me and I was facing the door where Larry came in, the entrance door to the bedroom. And, I just pointed the gun at the door while she's behind me, hoping they don't come through that door, you what I'm saying. I'm like this here, terrified. But, I'm conscious of what — you know, I'm conscious, but I'm scared, man, you know. I don't know what's going on, you know what I'm saying.

So the next thing you know, I'm just sitting there, you know and I could hear, I could hear car doors, you know. I could hear the car, cause the muffler, you know, sound like an old car or something. And the next thing you know, Larry came through the door. Rebe say — well, he say, he say "Rebe," and Rebe say "No, Red, that's Larry," you know. So I don't know, and as far as I'm concerned, they might have him hostage, trying to bring him in the room, you see. [249] So I'm still holding the gun, so he come through the door. He come through the door, but I'm still holding the gun on him, you know, cause I don't know him either. I don't know Larry. So I'm holding the gun on him, you know. And, then he get to the mirror, you know,

and I'm making sure ain't anybody coming behind him, you know. So I kind of relaxed, you know, and I say "Let me see what they did you," you know and I checked him.

Q What did you see?

A I seen where he was lacerated in the head and stuff like that. And, then, I seen where he was alright, conscious. He was alright. Then, we started to panicking. I say "Rebe, call Shelita's father." I say "No, call 911." And, then we start getting up, I took and put my thing back and start getting the hell out of there, you know. And, then, when I got through that house in my chair, you know, it had a guy laying across the doorway, going into the kitchen, from that room into the kitchen. They had another guy across from him you know and stuff like that. And, I couldn't get over him, so I had to get out my chair. Larry picked my chair up and put it over that body and when I got over that body, I went straight to Shelita. And, I say "Shelita, Shelita." So she responded, you know, and I seen a bullet hole through her leg, through her arm, and that's all I seen. And, you know, I was looking at them other brothers that was laying out there, man, but I was really concerned about the girl, you know what I'm saying, Shelita. And, you know, she seemed like she was 'gonna be kind of alright. And, I say "Just lay there. Just lay there."

[250]

Q Did she say anything?

A She was whining, like, you know. I didn't catch nothing she said. She was like, whining, you know. And, so I got her to lay there, you dig. I got in my chair and started getting out of there. I got out of there, you know. And the next thing you know, the police and stuff start coming. And, I told, you know, I told Rebe to just be cool, you know, "Just be cool." She was like —

Q And, did you leave after that?

A No, I didn't leave immediately after that. No, I didn't leave.

Q What happened next?

A I stood there and I was looking through the door. And, I was looking at Shelita and watching her, you know, just watching her, you know. And, I was just mad. I was just looking at her, you know. You know, I was just making sure she was gonna be alright, 'cause I didn't want to go back in there.

Q Were you able to see anyone who was shooting in that house?

A No, I didn't see anybody shoot.

Q I have nothing further. Thank you, Mr. Harbor.

* * * * *

IN CAMERA DISCUSSION

[264]

* * * * *

MR. JORDAN:

That's my objection, your Honor. I have a bunch of objections. Number 1; he hasn't talked to Larry Boatner. He's hired by the Defense perhaps to maybe impeach his credibility, but I don't know what credibility he's going to impeach, because, obviously, this gentleman wasn't there for the incident and can't state what state of mind Mr. Boatner was in when he actually witnessed the event. He can't state what state of mind he was in when he actually viewed the photographic lineup and I don't see the relevance.

Nor, has he talked to any doctors. Apparently he's read some medicals that indicate that Mr. Boatner was suffering from nightmares and was drinking.

MR. LARRE:

He's also read in his medical reports and, I don't really have a way to get the reports in, is that Mr. Boatner denies, specifically denied on the witness stand that he was having blackouts. In these reports they talk about blackouts. He said [265] out of his own mouth to the admitting physician.

Your Honor, I mean, we just qualified a policeman as a ballistics expert to determine that he could tell the size — the type of a bullet and we have a man here that's been —

THE COURT:

You know, I'm starting to feel like the Federal District Court. You know, I'm not going to let experts testify to anything, just because you have an expert. I'm not going to do it.

MR. JORDAN:

That's my second objection, your Honor, put it in line as we go. I've been given no notice —

THE COURT:

State versus Bobby Gurley is the case that again raises it's head in the air. It's like a spotted cow again coming right here on the issue.

MR. JORDAN:

No notice was given to the State at all that any expert was going to be used. Obviously, Mr. Larre knew that he was going to have medical records —

MR. LARRE:

That's not true. That's not true. I wasn't told I was going to get medical records until today.

MR. JORDAN:

[266] He —

MR. LARRE:

Can I finish?

THE COURT:

Let him finish, Mr. Jordan.

MR. LARRE:

I was told when I compiled my subpoena duces tecum two weeks ago, that the Judge would make a ruling on the — on whether I would get those reports.

THE COURT:

I decided to give you the reports today. The first time I saw the reports were today. And, the reason being, some lady from Charity Hospital, who's

an attorney, called and said that it didn't meet the Statute. And, I said I didn't care about the Statute. I had inherent powers to give the Six Amendment of the Constitution and you'd better bring the records. Either send the records or we're sending somebody to come and get you.

MR. LARRE:

And, the reason we got the record is 'cause we called looking for them and they said "If you send someone to pick them up you can get them."

MR. JORDAN:

The State filed Discovery, Your Honor. We haven't been given any notice of this. My question to Mr. Larre is, when did Mr. Larre have notice that he had this expert.

MR. LARRE:

[267]

I had notice when I told you about two hours ago.

MR. JORDAN:

So, you contacted this expert two hours ago?

MR. LARRE:

No, no. I contacted this gentleman and asked him if I had the medical records, would he be available to testify. I did not know I had medical records until I got them. I contacted him and said "I have medical records. Can you come down from Mandeville and take a look at them. And, that's when I knew I had an expert.

MR. JORDAN:

Your Honor, apparently he didn't get to this point yet, is apparently this witness is somehow going to impeach the credibility of one of our witnesses through reading some records. I just fine that — I don't see the relevancy. I see the purpose, but I don't see the relevancy.

* * * * *

[274]

* * * * *

MR. JORDAN:

Well, we filed a motion for Discovery, your Honor, which requires that the Defense gives us notice of any experts so we can be put on notice.

MR. LARRE:

I didn't know I had an expert until two hours ago. I never personally spoke to this man, ever.

THE COURT:

Let's see the motion, what you asked for.

MR. LARRE:

They had asked for written reports and I have no written reports.

MR. JORDAN:

I would like to request when the Defense Counsel first contacted this witness or had anybody from his office contact the witness.

THE COURT:

I think what happened was, when he testified at the motion hearing, he asked for an in-camera

inspection of the medical records at Charity Hospital. A subpoena, a regular subpoena was issued for those records. That subpoena is in the record. It's noted in the record. That subpoena, Charity Hospital claimed they never got it, so the records never got here. Evidently, there's some [275] Statute that's been passed that gives them 72 hours or something to that effect, that they can refuse to bring records. Either the State or the Defense or somebody asked me to get on the phone with a staff attorney from Charity Hospital, or the Medical Center of Louisiana, and explain that Statutory requirement to me. And, I said "Well, we've issued a subpoena before." And, I said "Forget about that Statute. We're in the middle of a murder Trial and the 6th Amendment Right of the Constitution applies. I want them here right now." And, they complied and somebody went and picked them up. I don't know who picked them up. I don't know who picked them up, either the State or the Defense, I don't know who picked them up. I read them, couldn't disseminate very much out of the thing. Although, I did read where the man had nightmares and stuff like that. I read where he was drinking after he had this thing. So I thought that it was relevant for both sides to know that. You had brought it up in your argument, even at the beginning of the case. So I supplied it to Mr. Larre to view the records to determine if there's anything in there they want to deal with. They asked me to look for whether or not there were blackouts. I didn't see any, but it may be documented in there. I saw things that said "urine testing." It was negative for different substances after he was [276] in there. I saw in the report, there was some things that were

difficult to read, but what I read was he had a problem with nightmares and sleeping.

I'm going to permit this man to testify. If there's anything that I feel is objectionable, I'll stop him from answering the question. If I feel it's not objectionable, I'll permit him to answer it.

Let's go back outside and finish the Trial.

* * * * *

TESTIMONY OF PAT KENT

[276]

* * * * *

DIRECT EXAMINATION

BY MR. LARRE:

Q Mr. Kent, you have previously qualified by the Judge, in the chambers, as an expert. Would you tell the ladies and gentlemen of the jury —

MR. JORDAN:

Your Honor, at this time, the State would object. We ask that the witness be qualified in front of the jury.

THE COURT:

Yes, he should be qualified in front of the jury, Mr. Larre.

BY MR. LARRE:

Q Mr. Kent, would you state your name, sir?

[277]

A My name is Patrick Kent.

Q Your occupation?

A I'm the Regional Director for the Louisiana Office of Alcohol and Drug Abuse; the region-9 treatment facilities, which are the Florida parishes, the five parishes on the North Shore.

Q And, which parishes are those?

A Saint Tammany, Washington, Tangipahoa, Saint Helena and Livingston.

Q And, in that capacity, do you have — what is your actual job description?

A I'm the Clinical and Executive Director of 14 treatment facilities, in-patient and out-patient.

Q And, how long have you been clinical director of those 14 facilities?

A Well, these 14 in number has changed slightly over the years, but I've been a regional director now for 17 years and a director of multiple facilities since — about 19 years.

Q And, you are an employee of the state of Louisiana?

A That's correct.

Q And, you have some other job duties that you do, such as being a fellow —

A With the National Institute of Justice, Bureau of Justice Assistance. I consult to develope criminal justice treatment programs for folks involved in the commission of felonies who were alcoholic, drug-abusers.

Q And, do you also do any teaching?

A I supervise interns and psychiatric residents and clinical psychologists, clinical social workers and [278] nurses. And, I direct the programs that train those people.

Q And, how long have you been doing this?

A Well, it's been an inherent part of my job, so 17 years, give or take a year or two.

Q And, your educational background?

A A Master's degree in Clinical Psychology and a Bachelor's degree in Psychology.

Q And, you've been qualified as an expert in, how many parishes?

A I guess — I don't know. Maybe half of the parishes in the State at one time or another. It's been a long time. And, in Texas and Mississippi as well.

Q And, have you ever been denied in being qualified as an expert?

A No.

Q And, you have a relationship with Charity Hospital?

A Yes. Some of the facilities that I designed and opened and supervised over the years, I'm no longer doing it right now, but at one time, I supervised facilities in New Orleans and on the Westbank of Jefferson Parish, Plaquemines and Saint Bernard. And, we consulted — myself and a couple of other people consulted on the evolution of the detox program. But, what I do now is, refer patients there and take referrals from there back to my treatment facilities.

Q And, you do that on a regular basis?

A Yes.

Q Are you familiar with the Charity Hospital [279] admittance requirements for someone being admitted into the alcohol or drug treatment facility?

A Yeah.

MR. LARRE:

I tender the witness, your Honor.

[280]

* * * * *

Q Mr. Kent, did you have the opportunity to review the notes that were given to you that we received under subpoena from Charity Hospital?

A I've reviewed them. I haven't had a chance to thoroughly review them, but I have reviewed them.

* * * * *

[285]

Q Doctor — Mr. Kent, you testified that you refer patients to Charity Hospital?

A That's correct.

[286]

Q And, have you referred someone to Charity Hospital recently?

A We either refer to Charity Hospital or take after-care patients from Charity Hospital's detox unit twice a week.

Q Twice a week?

A Yeah.

Q And are you familiar with the admissions requirement to be admitted into an in-patient at Charity Hospital and stay for a week?

A Yeah. I originally wrote those requirements and designed a similar facility at the Charity Hospital in Independence with the same requirements.

Q Is it easy to get in Charity Hospital?

A No, it's essentially — the screening criterion is concretely life-threatening, potential life-threatening withdrawal. There's just too great a demand and too little supply of the service to allow people to get in for anything less.

Q So, someone who is admitted to Charity Hospital and diagnosed as acute alcoholic, or in the throws of acute alcoholism, would be someone who is a pretty sick person?

A Yeah. There's screening at a couple of different levels; three levels actually. There's the West-admit, which is the emergency room. There's where the initial triage happens. And, then they go to secondary triage for a psychiatric or internal medicine resident. And, then they actually go to CIU, which is Crisis Intervention Unit, which access a foyer to the detox programs. So, there's three levels of screening actually.

[287]

Q I have no further questions, sir.

PETITIONER'S EXHIBIT 1 FROM HEARING ON PETITION FOR POSTCONVICTION RELIEF (FILES OF THE ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE)

* * * * *

CHARITY HOSPITAL RECORDS FOR LARRY BOATNER

* * * * *

[DA2079]

6/28/95 10:00 1-1 with the pt in order to address his concerns about "being harassed by an NOPD (Detective Steve Ruffilo)" to identify a suspected perpetrator or perpetrators that were allegedly involved in shooting incident last March. The pt continued to express feelings of "fear and confusion." Worker offered assurance to the pt that in accordance with Federal Confidentiality guidelines —that the officer would not be permitted on this unit. The matter may be pursued however once he is released from our facility. Encouraged the pt to maintain linkage with his probation officer for further advice in this matter. (Dr signature — can't read) Acute Psych Unit

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NEW ORLEANS POLICE DEPARTMENT
HOMICIDE DIVISION
CONTINUATION SHEET

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[DA3714]

LOCATION OF OCCURRENCE

2230 North Roman Street, New Orleans, Louisiana

DATE AND TIME OF OFFENSE

Wednesday, March 1, 1995 at 8:30 pm

* * * * *

[DA3724]

WEAPON

A 7.62x39mm, AK47 type assault rifle, a 9MM weapon, and a .25 caliber semi automatic handgun. (7.62X39MM and 9MM spent casings found on the scene, along with 9MM and 7.6X39MM spent bullets. A .25 caliber semi automatic handgun was recovered from the hand of arrested subject Philip Young.

PROPERTY STOLEN

Unknown.

MOTIVE

Possible drug related robbery.

PERSONS INTERVIEWED

1). Dwight Alexander, black male, date of birth 3-18-71, residing 2220 Orleans Avenue, New Orleans, Louisiana, and telephone number 821-0428.

2). Raymond Legget, black male, date of birth 5-31-76, residing 2220 Orleans Avenue, New Orleans, Louisiana, and telephone number 949-8613.

3). Kirk Roche, black male, date of birth 3-28-69, residing 2105 Duels Street, New Orleans, Louisiana, and telephone number 949-8469.

4). James Netta Simon, black female, date of birth 10-15-51, residing 2806 Annette Street, New Orleans, Louisiana, and telephone number 943-7957.

5). Archie Smith, black male, date of birth 11-30-68, residing 5164 Lakeview Court, New Orleans, Louisiana, and telephone number 242-8356.

6). Robert Smith, black male, date of birth 6-22-35, residing 4534 Dale Street, New Orleans, Louisina, and telephone number 242-4524.

7). James Boatner, black male, date of birth 3-8-70, residing 627 Alvar Street, New Orleans, Louisiana, and telephone number 945-9377.

8). Troy Boatner, black female, date of birth 7-7-75, residing 621½ Alvar Street, New Orleans, Louisiana, and telephone number 945-9377.

9). Larius Mitchel, black male, date of birth 10-21-73, residing 629 Alvar Street, New Orleans, Louisiana, and telephone number 944-5397.

[DA3725]

10). Dandrea Simms, black female, date of birth 6-6-68, residing 2515 Bartholomew Street, New Orleans, Louisiana, and telephone number 943-0740.

11). Cecille Williams, black male, date of birth 2-27-57, residing 1800 Marigny Street, New Orleans, Louisiana, and telephone number 943-4638.

12). Clarence Brown, black male, date of birth 5-16-44, residing 1731 Marginy Street, New Orleans, Louisiana, and telephone number 945-0971.

13). Dale Mimms, black male, date of birth 11-7-50, residing 2218 North Roman Street, New Orleans, Louisiana, and no telephone.

14). Reginald Harbor, black male, date of birth 3-12-60, residing 1440 Delachaise Street, New Orleans, Louisiana, and telephone number 821-0787.

15). Lucille Hooks, black female, date of birth 11-14-50, residing 1542 Painters Street, New Orleans, Louisiana, and telephone number 949-9411.

16). Mary Young, black female, date of birth 1-15-30, residing 902 Felicity Street, New Orleans, Louisiana, and telephone number 581-6959.

17). Jamarr Arnold, black male, date of birth 3-11-76, residing 1542 Painters Street, New Orleans, Louisiana, and telephone number 949-9411.

18). Michelle Branch, black female, date of birth 9-20-72, residing 809 St. Mary Street, New Orleans, Louisiana, and telephone number 596-6838.

19). Barry Moore Nelson, black male, date of birth 12-10-60, residing 1209 Spain Street, New Orleans, Louisiana, and telephone number 943-7585.

20). Kenny Galloway, black male, date of birth 2-16-58, residing 1720 Marigny Street, New Orleans, Louisiana, and no telephone number.

DETECTIVE ASSIGNED
John Ronquillo

NARRATIVE

On Wednesday, March 1, 1995 at 8:45 pm., Detective John Ronquillo, assigned to unit 3241 of the Homicide Division of the Investigative Services Bureau, respectfully reports being . . .

* * * * *

[DA3728]

Ronquillo then noted that two of the victims were in the ambulances parked in front of the house, but was unable to talk to them because of their medical condition.

At 9:00 pm., Ronquillo spoke to Rebie Espadron, relayed the same information to Ronquillo as she told the reporting officers on the scene. Espadron added that a subject she knows only as Reggie, and confined to a wheelchair, was in the rear of the house with her at the time of the shooting, and had left the scene.

Espadron then advised Ronquillo that the male subject in the ambulance, and shot in the living room with a subject known as Robert, must be one of the perpetrators because he was not in the residence prior to the shooting, and was unknown to her.

At 9:05 pm., Ronquillo spoke to Larry Boatner, the victim who has found in the bathroom of the residence by police officers, and had sustained a laceration to the rear of the head.

Boatner advised Ronquillo that he opened the door of the residence after hearing a knock, and observed three black males with rifles and guns, exit an old, white, four door automobile, with a loud muffler. Boatner was confused if he heard a knock or opened the door after hearing the loud muffler on the vehicle.

Boatner continued by telling Ronquillo that the subjects demanded money, and then hit him in the back of the head. Boatner then added that everyone on the kitchen began to lie down on the floor and it was then that they began shooting. Boatner stated that he was lying by Willie Legget, and just closed his eyes and waited to be shot.

Boatner then said that he heard three car doors slam and heard the vehicle with the loud muffler drive away in an unknown direction.

Boatner then added that he saw his friends shot and identified the subjects in the living room as a friend named Robert, and the subject with the gun in his hand, as one of the perpetrators.

Boatner then said that the second subject in the living room had to be a perpetrator because he was not in the house prior to the shooting, and was unknown to him.

Boatner then added that a subject known only as Reggie, and confined to a wheelchair, was in the back of the house and had left the scene.

[DA3729]

Boatner described the guns as being one AK type assault rifle, one Tech Nine type handgun, and a silver colored handgun. Boatner could not supply

any additional information on the weapons, or supply a description of the perpetrators other then they were black males.

Boatner added that there must have been four perpetrators, because he heard three car doors slam, and one of the perpetrators was still in the residence.

At 9:15 pm., Ronquillo turned his attention to the crime scene and observed the initial scene was confined to 2230 North Roman Street, a double house that had been converted into a single family dwelling. The house is a wood frame, single story structure. The house is situated on the river side of the street.

As you enter the front door of the residence, you enter the kitchen area of the residence, through a door that showed no signs of any forced entry.

The kitchen had a stove to the right of the door, and positioned on the lake side wall, and between the door and a row of cabinets running along the floor the length of the uptown wall. The cabinets were topped with a counter and a sink in the middle of the cabinets. Cabinets also ran along the uptown wall above the counter, with a window in the middle of the wall.

A refrigerator, a freezer, and a microwave placed atop a microwave stand, were positioned on the downtown wall of the kitchen, and between the front door and the doorway of the second room.

A glass dining table, with the glass top in pieces and on the kitchen floor, and positioned around the legs of the table. Bottles of beer and liquor were observed in the glass rubble. The glass portion of the table was wet with beer and liquid substances.

A chair for the table was observed in the river, downtown corner of the kitchen, along with an overturned chair near the table, and another upright chair in the river, uptown corner.

A rear door was observed on the riverside wall of the kitchen, with the door near the uptown corner of that wall. This door was unlocked upon the detectives arrival, but closed.

An entranceway to the second room was on the downtown wall of the kitchen, with an opened door in the entranceway.

The overhead light was illuminated in the kitchen.

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[DA3739]

Hill then told Deal that he observed three or four additional black males, in addition to the subject who was standing on the street, and the subject who opened the door. Hill added that the subjects were sitting around the table and casually talking.

Hill then told Deal that none of the subjects were armed, and did not recognize any of the subjects, and knew none of them to be Robert.

Hill supplied Detective Deal with a description of the subject who opened the door and the subject who was standing in front of the residence.

The subject who was standing in front of the residence was described to be 25 years of age, 5'11" tall, 175-180 pounds, with a moustache and short hair, and wearing a red jacket and dark pants, and a lighter complexion then the other subject, and a

diamond earring in his ear. The subject who opened the door was described as being about 23 years of age, 5'6" to 5'7" tall, about 125 pounds, wearing a black jacket and dark pants, with a medium haircut, and dark complected.

Hill advised Deal that he could possibly identify the subjects from photographs.

Ronquillo then observed at 1:55 am., that Detectives Michael Fejlo and Ryan Hebert were taking a type written statement from known witness Kenneth Smith, residing 1736 Marigny Street.

Ronquillo interrupted the statement and was advised by Smith that he was in his bed at his residence when he heard about thirty shots. Smith said that he looked out bedroom window, on the North Roman Street side of the residence and observed the subject Rebie screaming in the street. Smith then said that he went to his front door and observed a two subjects he knew as Marty, and Marty's uncle or cousin, running to a car parked on Marigny Street and drive off very fast. Smith described the vehicle as a blue, Buick, with primer marks on the car.

Smith then said that Marty got into the passenger door, with his uncle driving the vehicle.

Smith then added that he knows 2230 North Roman Street to be a location where drugs are sold and had seen Marty go into 2230 North Roman Street about 4:30 pm., on the evening of the shooting, while his uncle standing in the middle of the block.

Smith then advised Ronquillo that he had seen Marty in the past, with a 9MM handgun, in particular waving the gun from the car window.

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[DA3740]

Smith concluded that he did not see any of the shooting.

Ronquillo then spoke to Detective Archie Kaufman, at 2:05 am.. who was taking a type written statement from Larry Boatner.

Kaufman advised Ronquillo that Boatner rendered in his statement, the follow information concerning the crime.

Boatner said that he answered the door of the residence after he heard a knock, and the first subject put a gun in my face. Boatner added that everyone else was sitting at the kitchen table when the subjects, who now numbered three, ordered everyone to the floor and demanded money. Boatner then said that one of the subjects hit him in the head with a gun and he fell on the floor with the rest of the subjects.

Boatner then said that Rebie came from the back room and the subjects ordered her to get down and they started shooting. Boatner then said that after they stopped shooting, they said lets go and heard three car doors slam. Boatner then added that Rebie came into the room and started screaming.

Boatner then said that he could not describe any of the subjects, other than the subject who put the gun in his face. Boatner described him as being a black male, with a low cut, and golds in his mouth. Boatner then added that they had an AK rifle, a Tech Nine, "Uzzi" type gun, and a chrome, automatic

pistol, which Boatner said was the gun that struck him in the head.

Boatner described the car as being a white, four door car, medium size, with a bad muffler, which made a lot of noise. Boatner added that the car was parked facing Elysian Fields.

Detectives James Stewart and Derek Sino then spoke to Ronquillo about 2:30 pm., and advised him that they received a statement from Rebie Espadron, which was type written, at 10:45 pm.

Stewart and Sino advised Ronquillo that Espadron told them that she was in the bedroom of the house with a subject she knows only as Reggie, when she heard noise in the kitchen. Espadron then advised detectives that she opened the door to the kitchen and observed everyone in the kitchen on the floor. Espadron then added that she slammed the door and returned to the back of the house. Espadron then said that she heard a lot of gunfire. Espadron then said that when the shooting stopped she waited a couple of seconds, and then the shooting started again.

[DA3741]

Espadron then said that Larry Boatner came to the back of the residence and she walked to the front of the house with Larry and saw everyone on the floor.

Espadron described the only perpetrator she saw as being 5'6" tall, a thing around his face, slim build, and wearing a jacket and a stocking cap.

Espadron then said that Robert Simons sold marijuana from the residence on the day of the

shooting, and sells cocaine on the street away from the house.

Espadron could only describe the gun as being a big gun, and added that Robert had a .25 caliber handgun, which she described as small.

Stewart and Sino then supplied Ronquillo with Espadron's statement.

All of the above mentioned statements were supplied to Ronquillo by the respective detectives and have been placed in the case file for future reference.

Ronquillo was then met by Detective Caprera at 2:45 am. and Caprera supplied Ronquillo with the New Orleans Police Department Evidence/Property Card, assigned Control Number D-12555. The card noted that Correctional Officer G. Shelmire received from Detective Caprera the following evidence on March 2, 1995 at 2:15 am.

1). One black tennis shoe.

On Thursday, March 2, 1995 at 8:00 am., Ronquillo attended the autopsy of all four victims, which was conducted by Doctor William Newman. The autopsies lasted until 3:45 pm.

Ronquillo has listed all the wounds learned at the autopsy in the wounds section of this report.

Newman advised Ronquillo that it appeared that all the subjects had been shot while lying down, although some of Ian Jackson's wounds were sustained while appearing to be running. Jackson was found in the alley on the side of the house.

Newman also recovered the following evidence during the autopsy of the victims.

1) Three spent bullets. (Autopsy of Willie Leggett)
2) Three spent bullets. (Autopsy of Robert Simons)
3) Two spent bullets. (Autopsy of James Jackson)
4) Nine spent bullets. (Autopsy of Ian Jackson)

It should be noted that the above described evidence would include fragments in the count of bullets recovered.

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[DA3747]

At 8:15 Rumore received a telephone call from Mitchell Young, the brother of Phillip Young, telephone number 596-6838, who described his brother as 5'9" tall, 19 years of age, a fade haircut, with the tattoo "Shack" on the left arm, with three golds in his mouth, one being a solid gold, one having the design of a heart, and one having the letter "S".

Young concluded the conversation by saying that his brother has been missing since the March 1, 1995.

* * * * *

[DA3749]

At 4:00 pm., Ronquillo contacted Larry Boatner and Rebie Espadron, at telephone number 943-7957, and now residing (illegible)

Touro Street, New Orleans, Louisiana. Both subjects advised Ronquillo that they could not identify any of the perpetrators of the murder. Boatner added that he could identify the car if the motor was running.

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[DA3751]

At 9:45 pm, Ronquillo spoke to Michelle Branch, at telephone number 596-6838. Branch advised Ronquillo that Phillip Young was her boyfriend, and that he lived at 809 St. Mary Street, apartment "O", with her and her children. Branch added that she was pregnant with Young's child.

Branch then told Ronquillo that she last saw Young on Wednesday, March 1, 1995 about 6:00 pm., when he left the house with her 1976, she wasn't sure of the year, Chrysler, LeBaron, beige in color and mistaken for white at night, with no license plate, and having a bad, noisy muffler. Branch added that the car was very loud due to the muffler. She said, "Everyone knew when you were coming with that car."

Branch added that she didn't know Young's friends and knew that he left alone. Branch said that an older man was putting a radio in her car when she looked out the window prior to Young taking the car. She could not identify the older black male.

Branch then advised Ronquillo that she received a telephone call from an unknown caller, on Friday, March 3, 1995, who stated that one Kintad Phillips was driving her car in the Calliope Housing Project,

and had put a temporary license plate in the rear window having numbers 3725895.

Branch added that Phillips is known to be with a subject named "Fats", or Donielle Bannister, and has killed people before.

Branch concluded the conversation by saying that she did not Phillips to have a gun of any kind, and never saw him with a gun.

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[DA3759]

On Sunday, March 12, 1995 at 6:00 pm., Ronquillo contacted known witnesses Rebie Espadron an Larry Boatner, via telephone communications at telephone 943-7957. Ronquillo made an appointment with Espadron and Boatner for Monday, March 13, 1995 at 5:00 pm., for the presentation of the photographic lineups numbered one through three, and with Kintad Phillips, Donielle Bannister, and John Jordan, as the subpects.

Also on Sunday, March 12, 1995 at 7:00 pm., Ronquillo and Detective Wayne Rumore went to 1736 Marigny Street, and attempted to speak to known witnesses, Kenny Smith, and show him the photographs of Barry Nelson and Jamarr Arnold, known to Smith as Marty.

Ronquillo and Rumore then patrolled the area of the Sixth District, and the area of the murder for the 1979 Chrysler, LeBaron, with the bad, noisy muffler, between 7:30 pm. And 9:00 pm.

On Monday, March 13, 1995, at 9:00 am., Ronquillo spoke to Forensic Light Examiner

Timothy Seuzeneau, who informed Ronquillo that all the submitted evidence from the crime scene and the warrant on 2046 Rousseau Street, apartment "C", was negative for any fingerprint evidence.

Ronquillo then spoke to Firearms Examiner Kenneth Leary, at 11:00 am., on March 13, 1995, and requested that Leary compare the 9MM ammunition assigned Item Numbers A-913-95, the murder of Kenneth Harris, G-50386-93, the murder of Edward Campbell, and C-1771-95, for common weaponry.

Detectives Ronquillo and Joseph Waguespack, on Monday, March 13, 1995 at 3:59 pm., received a tape recorded statement from the girlfriend of arrested subject, Philip Young, Michelle Branch, black female, date of birth 9-20-72, residing 809 St. Mary Street, apartment "O", New Orleans, Louisiana. The statement was rendered by Branch at her home on St. Mary Street.

Branch advised detectives that she is the girlfriend of Philip Young, and that Young lived at the St. Mary Street address with her. Branch added that on Wednesday, March 1, 1995 about 6:30 pm., she noticed that Young had left the rear driveway of 809 St. Mary Street, with her vehicle, which she described as a light yellow, Chrysler, LeBaron, with no muffler. Branch added that the car would look white at night, and with the muffler gone, was very loud.

Branch then told detectives that she has received phone calls from unidentified individuals, who have advised her that one Kintad Phillips, has been seen driving her car, and had placed a license plate in the rear window. Branch then stated that the

vehicle did not have a license plate on the vehicle when Young took the car on march 1, 1995.

[DA3760]

Branch then told detectives that Kintad Phillips had a friend she only knew as "Fats", and that she did not know Young to be friends with Kintad Phillips or "Fats".

Branch then stated that Young left alone on March 1, 1995, and added that she has not heard from him since that date.

The statement was concluded at 4:07 pm.

Branch concluded her conversation with detectives by added that her friend, Tonya Young, who lives in the St. Bernard Housing Project, and telephone number 282-4498, received a telephone call from "Fats", who was calling to speak to Young's boyfriend. Branch observed that "Fats" called from telephone number 821-1529.

* * * * *

At 5:40 pm., Ronquillo spoke to Kirk Roche, a relative of Robert Simons, at 2609 Touro Street. Roche advised detectives that the talk in the neighborhood is that "Dukie" was involved in the murders on North Roman Street. Roche added that they believe "dukie" is involved because he drives a white, Chevrolet, Beretta, with a bad muffler. Roche then said that "Dukie" may be named Leonard Burnette, Barnett, or Bernette, known to frequent a store tat the intersection of St. Anthony Street and North Dorgenois Street, and living in the 2400 block of St. Anthony Street.

Roche then described "Dukie" as being 6'0" tall, having a heavy build, with four gold teeth on the top and two gold teeth on the bottom. Roche then added that "Dukie" has a fade hair cut, but always wears a hat. Roche then added that the car driven by "Dukie" has a "For Sale" sign in the window.

* * * * *

[DA3778]

Cook advised Ronquillo that Young was in a coma and responds only to pain. Cook added that he didn't expect Young's condition to improve, but advised Ronquillo to check with the hospital on a monthly basis.

Ronquillo observed that the suspect was non responsive to verbal commands, and opened his eyes when struck in the shoulder by Doctor Cook, but then returned to the coma state. Ronquillo also observed that the suspect had lost a great deal of weight since the time of the shooting, and appeared to be in failing health.

On Tuesday, April 4, 1995 at 2:00 pm., Ronquillo spoke to Firearms Examiner Kenneth Leary. Leary advised Ronquillo that the 9MM spent casings, the 7.62X39MM spent casings, and the .25 caliber spent casings were fired from a common weapon. Leary added that he has yet to examine all the spent bullets recovered from the scene and the autopsy, but on the examination conducted on a portion of the spent bullets, it appears that they awere fired from a common weapon.

On Thursday, April 6, 1995 at 11:30 am., Ronquillo received a 1995 "Bust Hotline Synopsis"

for the months January through April of 1995, from Sergeant Belinda Medina, employed by the Louisiana National Guard, and assigned to the New Orleans Police Department's Narcotics Intelligence Section. The "Hotline" synopsis detailed the current "Hotline" drug complaints for the Seventh Police District. The synopsis was reviewed by Ronquillo and placed in the case file for future reference.

On Friday, April 7, 1995 at 7:30 am., Ronquillo received a copy of two (2) Crime Laboratory Report completed by Firearms Examiner Kenneth Leary, on April 4, 1995, and assigned Item Number C-1771-95, and explaining his findings, resulting from examinations conducted between March 29, 1995 and April 4, 1995. Below are the contents of the two reports, which will referred to as Firearms Identification Reports numbered one and two.

Firearms Identification Report Number One:

Examination requested: Firearms Identification.

Specimens:

1). One (1) Excam-A.T.G., model GT27, .25 caliber, semi-automatic pistol, serial number 58610.
2). Three (3) fired, .25 caliber, cartridge cases-scene.
3). Seventeen (17) fired, 9MM, cartridge cases, recovered from the living room floor.
4). Nine (9), fired, 9MM, cartridge cases-scene.
5). Eighteen (18), fired, 7.62X39MM, cartridge cases-scene.

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[DA3781]

On Monday, May 15, 1995 at 10:00 am., Ronquillo spoke to Firearms Examiner Kenneth Leary concerning the aforementioned request submitted on May 11, 1995. Leary advised Ronquillo that the 9MM ammunition confiscated from the Roman Street murder was typed to have been fired from a Inter Tec, "Mac 11" model type, semi automatic weapon, and not from the handgun confiscated from Bannister at the time of his arrest under Item Number E-11461-95. Leary did not conduct any examination because prior examination were conducted with the recovered 9MM ammunition from the Roman Street scene and determined it was fired from the same weapon.

On June 1, 1995 at 11:00 pm., Ronquillo met with Detective Byron Adams, assigned to the Homicide Division of the New Orleans Police Department, who was investigating the murder of Devlin Thompson, black male, date of birth 11-19-91, Tangie Thompson, black male, date of birth 9-24-65, and Andre White, black male, date of birth 1-18-65, which occurred on Sunday, February 5, 1995 at 2:50 pm., and assigned Item Number B8172-95.

Adams advised Ronquillo that on Friday, May 19, 1995 at 8:54 pm., he received a tape recorded statement from known witness Eric Rogers, black male date of birth 11-15-74, who is incarcerated in the Orleans Parish Prison for the crime of First Degree Murder.

Adams continued by telling Ronquillo that Rogers advised him that an inmate identified as Robert Trackling, black male, date of birth 2-16-76,

admitted to being involved in the murders which occurred on North Roman Street. Adams then stated that Rogers added that Trackling committed the murders with subjects he identified as "Kintad Phillips, with the nickname "Buckle", Donnielle Bannister, with the nickname "Fats", and Juan Smith, with the nickname "Shortdog".

Adams continued by telling Ronquillo that Rogers described the murder as told to him by Trackling. Rogers stated to Adams that Trackling told him that he, along with "Buckle", "Short Dog", and "Fats" went to the house on North Roman Street. Rogers continued by saying that Trackling then added that they knocked on the door and went in when an individual opened the door. Rogers stated that Trackling then said that seven men were in the house and they made them lay on the floor of the house and asking where was the "stuff", who did not respond to the question.

Rogers then added that Trackling continued the conversation by saying that a female in another room opened the door and that one of the guys on the floor jumped up, recovered a gun from under his shirt, and began shooting at them. Rogers continued by adding that Trackling said that Donnielle Bannister picked up the gun used by the subject who jumped from the floor shooting, after it fell to the floor, [DA3782] and began shooting the subject with his gun.

Trackling then told Rogers that they left the scene because of all the noise caused by the gunfire. Rogers added that Trackling stated that they left the scene in a burgundy colored automobile.

A copy of Roger's statement has been attached to this report.

Adams then advised Ronquillo that he had just received a tape recorded statement from Robert Trackling, in the Homicide Office, on the night of the conversation with Ronquillo. Adams advised Ronquillo that Trackling stated he was not involved in the murders on North Roman Street, but added that three subjects he identified as Kintad Phillips, Juan Smith, and Donnielle Bannister, told him they were responsible for the shootings on North Roman Street, and added that he did not know any of the particulars of the crime.

Adams then added that Trackling admitted to being involved in the shooting deaths of Andre White, Tangie Thompson, and Devlin Thompson. Adams said that Trackling admitted to being the driver in the Thompson and White murder.

Ronquillo, on Friday, June 2, 1995 at 9:00 pm., prepared the following three photographic lineups, each consisting of six New Orleans Police Department Bureau of Identification photographs. The photographic lineups will be referred to as photographic lineups numbered thirteen, fourteen, and fifteen.

Photographic Lineup # 13:

1). 314591P: Donald Eddington, black male, date of birth 11-23-73.
2). 339851P: Juan Smith, black male, date of birth 8-28-74. (Suspect)
3). 320005P: Renaldo Cains, black male, date of birth 1-18-74.

4). 300264P: Leroy Kelly, black male, date of birth 6-13-71.
5). 279233P: Brian Nickles, black male, date of birth 11-11-68.
6). 339371P: Bernard Wilson, black male, date of birth 1-3-76.

Photographic Lineup # 14:

1). 322413P: Perry Johnson, black male, date of birth 11-4-71.
2). 293576P: Eugene Riley, black male, date of birth 11-21-70.
3). 319992P: Romalice McGee, black male, date of birth 2-1-73. (Suspect)
[DA3783]
4). 275812P: Walter Phillips, black male, date of birth 10-6-67.
5). 332141P: Demond Greenwood, black male, date of birth 2-20-74.
6). 336522P: Leon Ricks, black male, date of birth 11-5-74.

Photographic Lineup # 15:

1). 332011P: Patrick Wade, black male, date of birth 6-16-75.
2). 306618P: Tyrone Mackey, black male, date of birth 12-2-71.
3). 325648P: Donnell Brown, black male, date of birth 6-12-72.
4). 349232P: Robert Trackling, black male, date of birth 2-16-76. (Suspect)
5). 335525P: Jospeh Davis, black male, date of birth 2-14-63.

6). 321122P: Donald Crockett, black male, date of birth 12-17-73.

On Saturday, June 3, 1995, at 2:00 pm., Ronquillo presented the three photographic lineups numbered thirteen, fourteen, and fifteen to known witness Rebie Espadron, at her residence located at 3122 Toulouse Street, New Orleans, Louisiana. Espadron failed to make any identification. It should be noted that known witness Larry Boatner was scheduled to be present at 2:00 pm., at 3122 Toulouse Street, but was not present. Ronquillo continued to telephone Espadron the entire day, and Boatner did not come to the residence.

On Saturday, June 10, 1995 at 2:00 pm., Ronquillo spoke to Espadron, via telephone communications, at her residence. Espadron informed Ronquillo that she spoke to Boatner on Sunday, June 4, 1995, and Boatner informed her that Boatner identified the photograph of Juan Smith, which was displayed in the Sunday, June 4, 1995 issue of the Times Picayune Newspaper, as the subject that entered the house at the time of the murders and hit him in the head with a gun. Espadron then added that she has not seen or spoken to Boatner since the conversation on June 4, 1995. Espadron supplied Ronquillo with Boatner's telephone number, 246-0369.

Ronquillo called telephone number 246-0369, at 3:00 pm., on Saturday, June 10, 1995, and spoke to the mother of Larry Boatner, Geraldine Boatner, residing 4401 Shalimar Drive, New Orleans, Louisiana. Boatner advised Ronquillo that she had not seen her son since Thursday, June 8, 1995. Boatner then assured Ronquillo that she would have

Boatner telephone him on beeper, or at his office as soon as she saw him.

* * * * *

[DA3785]

#111 Veterans Boulevard, Suite 1222, Metairie, Louisiana, 70005, and forwarded to Detective Ronquillo.

The report was concerning the "Excam", .25 caliber, pistol, model GT27, and serial number 58610, recovered from the crime scene.

The report noted that on June 22, 1977, the weapon was purchased by Dave's House of Guns, Inc., 9130 Viscount Row, Dallas Texas, and assigned Federal Firearms License 57502650.

The report additionally noted that the weapon was purchased by the Atlanta Grocery, Route One, Louisiana Highway 34, Atlanta, Louisiana, and assigned Federal Firearms License 57206572.

The report continued by noting that the dealer last in possession of the gun is deceased, and no further trace of the weapon is possible. The report additionally noted that the dealer died May 10, 1985, and all records were destroyed.

On Monday, June 26, 1995 at 11:30 am., Ronquillo received a telephone call from Registered Nurse Barbara Riley, employed by the Rehabilitation Institute of New Orleans, located 4444 General Meyer Avenue, New Orleans, Louisiana, and telephone number 363-7552. It should be noted that Riley is the head nurse of Five North, a section of the Rehabilitation Institute of New Orleans.

Riley informed Ronquillo that Philip Young had begun talking and communicationg [sic] with others about one week prior to the conversation with Ronquillo. Riley added that his physical condition had improved to a level where he could sit in a wheel chair if his body is supported by restraints, and he could use his left arm and left hand.

Ronquillo went to 4444 General Meyer Avenue, at 2:00 pm., and met Registered Nurse Barbara Riley on the Five North Ward of the Rehabilitation Institute of New Orleans. Riley escorted Ronquillo to room 501, the room assigned to Philip Young.

Ronquillo observed Young to be strapped to a wheel chair that was positioned in the middle of the room, and watching television. Ronquillo also observed that Young could use his left arm and hand, but was very weak.

Ronquillo then spoke to Young and observed that his speech was very slurred and could only answer yes or no to questions. Riley then had the suspect blink once if the answer was affirmative, and twice if the answer was negative. Ronquillo asked general questions to Young concerning his health.

[DA3786] Riley then informed Ronquillo that Young would obey simple commands, and feels he understands what people are asking him. Riley then added that Young talks more to his family and black aids employed by the hospital, then to others. Riley then added that it appeared that Young did not want to speak to Ronquillo, and was very withdrawn after learning that Ronquillo was from the Homicide Division.

Ronquillo decided to speak to Young's physician, Doctor Howard Katz, concerning the suspect's ability to comprehend questions, before making a decision on questioning Young concerning the murders on North Roman Street. Ronquillo was also concerned on Young's ability to understand the Miranda Warnings, due to his present condition.

Also on Monday, June 26, 1995 at 4:00 pm., Ronquillo spoke to the mother of known witness Larry Boatner, Geraldine Boatner. Boatner informed Ronquillo that Larry Boatner had admitted himself to Charity Hospital, in particular the Psychiatric Ward of the hospital on Monday, June 26, 1995, sometime in the morning hours. Boatner did not know why her son admitted himself to the hospital.

On Wednesday, June 28, 1995 at 2:55 pm., known witness Larry Boatner was shown the photographic lineups numbered thirteen, fourteen, and fifteen, at Charity Hospital of New Orleans, in particular the third floor, where he is being treated for a substance abuse problem.

Boatner positively identified photograph number two, in lineup number thirteen, which is assigned to Juan Smith, as the person who forced his way into the home on North Roman Street, and struck him in the head with a gun, prior to the shooting of the occupants of the residence.

Boatner signed the rear of photograph number two, along with writing the date and the time of the identification on the rear of the photograph. Boatner then initialed the rear of the remaining five

photographs, along with placing the date and the time of the viewing on the rear of the photographs.

It should be noted that Psychiatric Aid, Jane Mills, black female, date of birth 6-23-34, residing 1436 Lincoln Avenue, Marrero, Louisiana, and telephone number 348-2595, and employed by Charity Hospital of New Orleans as a Psychiatric Aid, was present at the time of the presentation of the photographic lineups to Boatner.

Ronquillo then prepared a Warrant of Arrest along with the Application for the Warrant of Arrest at 4:30 pm., on Wednesday, June 28, 1995.

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[DA3788]

The report noted that Smith was arrested from 1100 Elysian Fields Avenue, New Orleans, Louisiana, while seated in a black and silver, Chevrolet Suburban, assigned Louisiana license plate number S697881, located in the front parking lot of the Walgreen's Drug Store having the same address. The report noted that Smith exited the vehicle from the front, driver's side door.

The report additionally noted that Detective Sergeant Gerard Duguse along with Detectives Kenneth Harris, Michael Fejka, Michael Mims, Derek Sino, Ryan Hebert, Norbert Zenon, and Wayne Tamborella, were responsible for the arrest of Smith.

The report also noted that Smith was orally advised of the Miranda Warnings by Detective Sergeant Gerard Dugue, and Smith was then transported to the Homicide Division Office by Police

Officer Joseph Narcisse, assigned to unit 504, of the Fifth Police District.

A copy of the aforementioned report has been attached to this report.

On Monday, July 10, 1995 at 10:30 am., Ronquillo spoke to suspect Robert Trackling, black male, date of birth 2-16-76, residing 3111(?) Broadway Street, New Orleans, Louisiana, at the Orleans Parish Prison, located at 531 South Broad Street, New Orleans, Louisiana, where he is incarcerated on first degree murder charges in the deaths of Andre White, Tangie Thompson, and Devin Thompson.

Ronquillo orally advised Trackling of the Miranda Warnings from New Orleans Police Department Rights of an Arrestee or Suspect form numbered 266303, at 10:33 am., and advised Trackling he was under investigation for the murders on North Roman Street. Trackling then stated to Ronquillo that he was advised by his attorney, Walter Crittenden, not to make any statements, and refused to sign the form and waive his rights.

Trackling made an unsolicited statement to Ronquillo that he was not involved in the murders on North Roman Street, and added that he was working for Dino's Pizza, located 1039 Broadway Street, New Orleans, Louisiana, and telephone number 861-4441, on the night of the murder.

Trackling then supplied Ronquillo with Crittenden's telephone number, 522-0100.

Ronquillo left the Orleans Parish Prison at 10:40 am.

[DA3789] Ronquillo contacted the office of attorney Walter Crittenden, on Monday, July 10, 1995 at 11:00 am. Ronquillo was unsuccessful in speaking to Crittenden, but left a message for Crittenden to telephone Ronquillo.

On Wednesday, July 12, 1995 at 11:00 am., Ronquillo spoke to Jacque, the manager of the Dino's Pizza located at 2215 Veterans Memorial Boulevard, Metairie, Louisiana, and telephone number 831-3100. Jacque advised Ronquillo that the restaurant where he is employed is the corporate office and has the employee records for all the Dino's Pizza restaurants in the greater New Orleans area.

Ronquillo then requested that Jacque check the records for employee Robert Trackling, and determine if he was working on the night of March 1, 1995, and supply Ronquillo with his work hours. Jacque advised Ronquillo that he would have the information requested by Ronquillo available on Friday, July 14, 1995 at 6:00 pm.

Also on Wednesday, July 12, 1995 at 1:30 pm., Ronquillo spoke to attorney Walter Crittenden concerning his permission to obtain a statement from suspect Robert Trackilng. Crittenden advised Ronquillo to telephone his office on Thursday, July 13, 1995, at 12:00 pm., and arrangements would be made to speak to Ronquillo concerning Trackling rendering of statement concerning his knowledge of the murders on North Roman Street.

On Thursday, July 13, 1995 at 12:00 pm., Ronquillo attempted to contact Crittenden at his office, but was unsuccessful in speaking to him.

Ronquillo left a message for Crittenden to contact him via his digital beeper.

Ronquillo has continued to telephone Crittenden daily until the completion of the writing of this report, and has yet to receive a response from Crittenden.

On Tuesday, July 25, 1995 at 12:45 pm., Ronquillo went to Dino's Pizza, located at 2215 Veterans Boulevard, Metairie, Louisiana, and spoke to manager Jacque Broussard. Broussard supplied Ronquillo with the time card of suspect Robert Trackling for the week of February 27th through March 5, 1995.

The time card, which was completed and signed by Trackling, noted that Trackling reported to work on Wednesday, March 1, 1995 at 12:15 pm., and signed out from work at 7:45 pm.

* * * * *

STATEMENT OF ERIC ROGERS

[DA3954]

On Friday, May 19, 1995 at 7:00 pm, Detective Adams took custody of Eric Rodgers at the Orleans Parish Prison and transported him to the Homicide Division where he rendered a formal statement relative to his knowledge of the Morrison Road Investigation. The statement was recorded on audio cassette tape. The following is a transcription of that statement:

NEW ORLEANS POLICE DEPARTMENT
INVESTIGATIVE SERVICES BUREAU
HOMICIDE INVESTIGATION DIVISION
FRIDAY, MAY 19, 1995
N.O.P.D. Item no. B 0817295

The following is a statement of one Eric L. Rogers. Negro male, date of birth 11-15 of 71, residing 2530 Cadiz street, New Orleans, Louisiana. This statement is being taken in regards to Mr. Rogers knowledge of the murder of one Devlin Thompson negro male, date of birth 11-19 of 71. Tangie Thompson negro female, date of birth 9-24 of 65 and Andre R. White negro male, date of birth 1-8 of 65. All of which formerly resided at 8130 Morrison road. This incident occurred inside of the Morrison road location on Sunday, February 5, 1900 and 95 at or about 2:50 P.M. This statement is being taken in the Homicide Division by Detective Byron Adams. Present during this statement is Samuel E. Reyne Louisiana license private investigator license number [illegible]. Mr. Raene is the investigator for Joseph Marcel counsel for Eric Rogers and is present for Attorney Joseph Marcel. The starting time of this statement is 8:54 P.M.

Q Denotes questions asked by Detective Adams.

A Denotes answers given by Eric Rodgers.

Q For the purpose of this statement would you state your name, your address and your age please.

A My name Eric Rogers, I'm 20 years old (inaudible)

Q And your home address?

A My home address is 706 Valence.

Q And with who do with whom do you reside on Valence street?

A With my my mother.

Q And her name?

A Verna Rogers.

Q Do you have a telephone number?

A Yes.

Q And what is that sir?

A 895-3047.

Q Do you know your social security number?

A No.

[DA3955]

Q Are you aware that this statement is being recorded on audio cassette tape?

A Yes.

Q Have any threats, promises coercions or any force or intimidations have been used for you to render this statement?

A No.

Q It is my understand that you are presently incarcerated with the Orleans Parish Criminal Sheriff's Office for a crime of second degree murder, is that correct?

A Yes.

Q Prior to being arrested for this charge have you ever been charged for any other violations?

A Charge a um . . .

Q Have you ever been arrested for anything else?

A When I was juvenile when I was a juvenile.

Q And what uh violations were those?

A Drugs, got busted with drugs and um a gun.

Q What is the highest level of your education, the highest grade you went to in school?

A The 10th when I was in um, special ed.

Q Can you read and write?

A Not good but could . . .

Q Do you know the reason why your here in my office today?

A No . . . yeah.

Q You said no you said yeah, do you know the reason why your here?

A Yeah.

Q And what is that reason to the best of your knowledge?

A For the um, I'm here for the um, make a statement.

Q Okay your gonna have to speak up a lil louder okay.

A I'm here for to make a statement.

Q Okay I was contacted by Investigator Reyne who informed me that you had knowledge and at the time of speaking to Mr. Reyne of 2 murders particularly one which occurred on N.

Roman street the other which occurred in New Orleans East is that correct?

A Right.

[DA3956]

Q In your own words why don't you tell me what knowledge you possess about these two crimes. Start from the beginning when you first learned the information, from who you learned the information from and where you were.

A Alright I was I was . . .

Q Again I have to tell you you must speak up.

A Alright. I was on C4 and I got the information from Robert he came up on the (inaudible) where I'm at. And he told me about the first the first crime they done. He say they done it on N. Roman he said that um it was him, Fat, Buckle and a guy they call uh, Short Dog. Say that they went up to the door and they knocked on the door and the guy open the door and they went in the house, and they had about 7 guys in there. And they made 'em lay down on the floor and they was asking the guys where where's the stuff and the guy didn't say nothing. They say that they had a girl in the um, room she open the door and when she open the door all of 'em turned around and say one of the guys that was on the floor jumped up and grab his gun from under his shirt and he went to shooting at her. They say that they raised up the gun and they went to shooting them. They went to shooting back and hit them and say one of the guys who was shooting that got off the floor his gun slid by um Darnell Banister foot, and Darnell

Banister picked up his gun and went to shooting the guy with that guy.

Q Then what transpired then what happened?

A Then after that he say that they left they left because they couldn't stay long because they had too much of noise from the gun from the fire, they had too much of noise and they had left.

Q Okay when do you know what day or date this conversation took place?

A No um, it was the the first day he came in but I don't remember the day the exact day he came up there, but I know it was the first day he came up there.

Q That's Robert?

A Yeah that's Robert.

Q Do you know Robert's last name?

A No but I know it start with a T.

Q And how do you know that?

A Because I saw it on his cup what he drink out of it, he had a RT on his initials.

[DA3957]

Q How long have you known Robert?

A Since 93.

Q Were yall acquaintance or would you just call yall selves friends or what?

A I use to I use to be in the project and he use to be you know come up everybody be talking but I never hung with 'em or nothing.

Q And do you know what charge Robert is in jail for?

A Yeah he say he in here for a first degree attempt murder, a arm robbery, and a battery charge.

Q And that was the first day that he was arrested that this conversation took place?

A Right.

Q And it took place on what (inaudible)?

A C4.

Q Can you explain to me the arrangements of how the (inaudible) are situated and how much distance where were yall when this conversation took place.

A Alright. I was um, C4 on the left side and he was on C4 on the right side cause he was standing by the gate. The gate about 4 feet apart from each other we was standing by the gate and he was telling me everything they done.

Q When he explain to you about N. Roman incident, did he tell you how they made good their escape were they in a vehicle, did they run off foot, did he explain to you?

A He said that they got in a car he said that the car was burgundy, a burgundy car.

Q Okay let's flight back or that concluded that or that ended that conversation that day?

A Um on that N. Roman on that N. Roman situation.

* * * * *

[DA3958]

Q Okay do you know who Fat is, what's his real name is?

A Yes his real name is Darnell Banister.

Q Do you know how old he is, can you describe him to me?

A He about he about 5 about 10 he got a low fade haircut, he got 4 golds in his mouth, 2 diamonds in the front and 2 solids on the side and he kinda heavy set.

Q What complexion is his skin?

A He's dark skin.

Q And about how old?

A He's about 18 years old, he about 18 years old.

Q Can you describe Buckle to me?

A Yeah his real name is Contez Phillips and he he tall, he about 5, 5, 11, he wear a faded haircut bald on the side. He wear lines in his eyebrows and he had he had six golds in his mouth but he took 'em out he took 'em out when um, before they left before they went home he was taking 'em out his mouth, he tall.

Q What complexion is he?

[DA3959]

A He dark skin.

Q And Short Dog?

A Short Dog he short he got golds going across his mouth and he like muscles he's like built lil short built.

Q Do you know Short Dog?

A No but Robert describe 'em to me.

Q Do you know Short Dog's real name did he tell you his real name?

A He say his real name is Juan but he didn't give me no last name.

* * * * *

[DA3960]

Q These guys Fat, Buckle and Short Dog do they have a name for themselves do they call themselves anything?

A They call Contez Philip Buckle, they call Darnell Banister Fat, Short Dog that's what they call him, they call Robert Home.

Q But do they have a name for their group?

A Oh yeah they call their self Cut Throat Posse.

Q And where do they mainly hang out at?

A They the Cut Throat they was hanging in St. Andrew court.

Q Where is that located?

A In the St. Thomas Housing Project.

Q St. Andrew and what?

A St. Andrew in the middle of Annunciation and St. Thomas.

Q Prior to your being arrested did you associate with this fellows?

A When when they when they came to jail for the murders that they done I was associating with

'em talking to 'em [DA3961] they was talking too.

Q Do you know where they keep their guns at or anything?

A No I don't know where they keep their guns.

Q During the oral interview with you . . . you gave me other names as far as the Cut Throat Posse?

A Yeah.

Q Okay the names you gave me correct me if I'm wrong Contez Phillips Buckle?

A Right.

Q Darnell Banister is Fat?

A Right.

Q Another guy by the name of Charles Wesley they call him Cousin Charles?

A Right.

Q Jermaine Davis they call him J Real?

A Right.

Q Terrence Simon T Simon?

A Right.

Q John Jordan they call him La La?

A Right.

Q Romales McGee they call him Ro?

A Right.

Q Negro male by the name of Vernon they call him Whammy?

A Right.

Q And a negro male you don't know his name but they call him Bo Pete, is that correct?

A Right.

Q Further in the um, further on in the oral interview you gave me names that members of the Cut Throat Posse had killed is that correct?

A Right.

Q You stated that a negro male by the name of Ray Campbell was murdered in 1993?

A Right.

Q That one Shawn Bernard witnessed the murder and he was subsequently killed on July 31, 1993, is that correct?

A Right.

Q And who did you say were the perpetrators to this [DA3962] crime?

A Darnell Banister and Contez Philip.

Q You also told me about a incident which occurred on Louisiana and St. Charles where a man was killed.

A In a car with his lil girlfriend. Darnell Banister said that him and Ro saw the guy turning off St. Charles to Louisiana. They had a lot of traffic and they pulled behind his car and they said that him and Ro got out the car and he walked up to the guy car and knocked on the window. And when the guy looked he started shooting 'em in his head, and one of the bullets hit the girl that was in the car with 'em.

Q You also advised me that members of the Cut Throat Posse were responsible for the murder of Cornell Preston?

A Right.

Q And who was he killed by?

A He was killed by Terry Simon, and Derrick (inaudible).

Q And where did you get this information who informed you of this?

A Cause I got information from Terry Simon when we was locked up together and he was on the (inaudible) with me and Derrick (inaudible).

Q Both of 'em told you about the killing?

A Yup.

Q What did they tell you about that crime?

A They told me that that the guy he was getting in his car and they said something to 'em and he said something back to 'em. They said that he was drinking beer he musta was drunk. They said Derrick said that they made the block and when Cornell was getting in his car that Terry Simon shot 'em and he felt by the door of his car and they pulled off and went back to the project.

Q And you also stated that members of the Cut Throat Posse was involved with the murder of Jerome Perry, Whammy?

A Right.

Q Wasn't he a member of their group, he wasn't a member of the Posse?

A Of the um, the Cut Throat Posse no.

Q How do you find out about information about Jerome Perry?

A I'm the guy that they got on the charge for it they was [DA3963] telling me that Whammy was the one (inaudible). Said that AK told Whammy to killed Jerome because AK thought that Jerome was gonna come to court on him for the murder that he done.

Q Okay do you know who AK is?

A Yes.

Q What's his name?

A His name is Jermaine Baker.

Q And Jermaine is he still in jail on that charge?

A Yes he got found guilty on 2 counts of first degree murder.

Q And who now told you that Whammy is the one who killed Jerome Perry?

A He told me it was um, Marlon Jackson Marlon Jackson who was on the charge for for that for Jerome murder.

Q Do you know if Jerome was uh, or whose responsible for whose on the charge now for Perry?

A Marlon Jackson and Leonard Leonard Dillon, Leonard Dillon.

Q And their saying that Whammy did it?

A Right.

Q Have this case been exposed of have they gone to court on this case and all yet?

A Marlon and them going to court on yeah he went to court on it.

Q You also told me about um, something about a Jermaine Baker?

A Right.

Q Can you tell me about that investigation or that case?

A About when he killed the guy in the front court?

Q Yes I want just what happened.

A Said that um he robbed the guy that came out there he shot one and killed 'em in the front court and he shot the other one. But the other one he ran to a old abandon houses and he died in the hallway they found 'em about a week later.

Q Do you know what happened to Cousin Charles, and you also told me let back up some you also told me about a killing of a man by the name of Clifford?

A Right.

Q And who was he killed by?

[DA3964]

A He was killed by Charles Wesley and Shawn Shawn Wesley.

Q Are these two brothers?

A No their friends they just have the same last name.

Q Also you related to me a incident which recently occurred about a week ago where uh 2 people

was shooting at the police and one of 'em was apprehended?

A Yeah Edward (inaudible) he go by the name of Light Bread and Kurt Sino they call 'em Kurt. And they was shooting at the police because they they kept guns on 'em in case they run into Buckle and Fat and them, cause they was into with 'em. So the police told 'em freeze and they pulled out their guns and they started shooting at 'em, the police caught Kurt with guns.

Q Again how long have you known (inaudible)?

A From Contez Philip.

Q Contez Philip.

A Since 86.

Q I would like to show you a photograph is this the same Contez Philip that were speaking of?

A Yes.

Q How long have you known Robert (inaudible)?

A Since 93.

Q Is this photograph the same Robert (inaudible) that we're discussing?

A Yes.

Q And how long have you known Darnell Banister?

A Since 80, 86.

Q Is this the photograph of the same Darnell Banister in which we're speaking of?

A Yes.

Q Why are you coming forward with this information?

A Because because they done they done a crime that I'm on a charge for what they done and I'm innocent and they don't wanna come forward and say that they done it.

Q And what crime is that?

A That I'm on?

Q Yes sir.

A I'm on I was on a first degree murder for the murder of Ivory Simms.

[DA3965]

Q And this is the charge that your saying that they committed?

A Right.

Q And that they won't come forward on?

A Right.

Q One second please. For what you know do you know who killed Ivory Simms?

A Yes.

Q And who is that?

A That's Darnell Banister, Romales McGee, John Jordan and Jermaine Davis was the driver.

Q And you weren't there?

A No sir.

Q Is everything you told me here today true and correct to the best of your knowledge?

A Right.

Q Is there anything you wish to add to this statement?

A No.

Q Is there anything you wish to take out of this statement?

A No.

Q This statement was given free and voluntarily?

A Right.

Q No force, threats, coercion?

A No.

Q Were used for you to this statement?

A Nop.

Q And again I ask you everything you stated here today is true and correct to the best of your knowledge?

A Right.

That concludes the statement of Eric Rogers, the conclusion time of this statement is 9:25 P.M., Friday, May 19, 1995.

* * * * *

STATEMENT OF LARRY BOATNER

[DA4284]

This is the statement of Larry Boatner, Black Male, date of birth 1-9-69, residing at 4401 Shalimar Drive, N.O., La. relative to his knowledge of the shooting incident which occurred at 2230 North Roman Street, where six (6) persons were shot leaving four (4) dead. The shootings occurred on

Wednesday March 1, 1995 at approximately 8:30 p.m. inside of the aforementioned location. Statement taken at the New Orleans Police Department, Homicide office.

Q DENOTES QUESTIONS ASKED BY DETECTIVE ARTHUR R. KAUFMAN

A DENOTES ANSWERS GIVEN BY LARRY BOATNER

DATE AND TIME STARTED: Thursday March 2, 1995 at 1:15 a.m.

Q Would you state your full name, and date of birth?

A Larry Boatner, Jr., 1-9-69.

Q Would you please state your home address?

A 4401 Shalimar Drive.

Q What is your home telephone number?

A 246-0369.

Q What is your social security number?

A 434-49-1399.

Q Are you employed, and if so, where?

A I work with my uncle, part time. I lay cement.

Q What is the highest grade level of education you've completed?

A 12th, Graduated.

Q Can you read, write and understand the English language?

A Yes.

Q Would you relate to me in your own words your knowledge of the events surrounding the shooting incident which occurred on Wednesday March 1, 1995 at approximately 8:30 P.M. at 2230 North Roman Street.

A One of the guys, he knocked on the door and I answered the door, he put the gun straight in my face. I looked dead down the barrel then every body else, we were sitting at the table, he said every body else get down on the floor and give me ya'll money. By this time I was still standing up, he told me to lay down. Then he told me to get up. I asked him did he want me to get up or stay down. He grabbed and pushed me toward the back door and he hit me with the gun on the head where I got stitches at. Everybody else was on the floor. Rebe, she came from the back room and said what ya'll doing. I think they told her get down and they started shooting. After they stopped shooting they said let's go. I heard three car doors slam. I got up and Rebe came in there and started screaming and we called the ambulance. Two was not moving they was all bleeding.

[DA4285]

Q Do you know the names of the people who were shot?

A Yeah, Robert Simons, Jimmy Jackson, Ian I don't know his last name, Will that's all I can tell you, and uh, Shalitha, Rebe's sister. That's all I know.

Q Can you describe the subjects whom shot the people in the house?

A I can tell you about one, the one who put the pistol in my face, he was a black male with a low cut, gold's in his mouth, I don't know how many, that's all, I was too scared to look at anybody, all of then had guns, one had an AK, one had a TEC-9, the one who hit me had a chrome automatic, it was big. I hear the car because it was so loud, the muffler, I know it need a muffler. I opened the door, I see these two guys, one he throws the gun in my face, the other one walked in behind him, he had the AK. I saw him get out of a car, the third guy, I didn't see the guy he had a TEC-9, it was an Uzi. He was pointing it at everyone on the floor. I was too scared to look at them, they was about my complexion, brown skinned.

Q What color were the other guns, aside from the chrome pistol?

A The TEC-9 was all black, the AK was brown and black with a long banana clip.

Q Did you see the vehicle, that the shooters got out of?

A Yeah, it was a old white four door car, medium size, it needed a muffler.

Q Again, you say you can't describe any of the other shooters besides the one who put the gun in your face after you opened the door?

A No, I can't.

Q What were you doing at the residence at the time of the shooting incident?

A Sitting down drinking beer, they call me their cousin, I'm close to the family.

Q Did you see or use any narcotics at the residence before the shooting?

A Not today, I drinked.

Q Have you observed any narcotics being sold or used at the residence at any other time?

A We smoked marijuana there a few times before.

Q How long were you there before the shooting incident?

A Since about 4:30 this afternoon.

Q Where were you before that time?

A With a female, Antionette, I don't know her last name, I just met her.

Q Do you have an address or phone number for Antionette?

A I have her beeper number, 880- I forgot the rest.

[DA4286]

Q Did you see which direction the shooters went after the shooting incident?

A No, the car was facing Elysian Fields Avenue.

Q Is this statement true and correct to the best of your knowledge?

A Yes sir.

Q Do you wish to add or delete anything from this statement?

A No, that's all I could think of.

Q Have you been forced or coerced into giving this statement?

A No man, I wish I could give ya'll a description.

End of Statement.....2:15 A.M.....March 2, 1995

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STATEMENT OF KENNETH SMITH

* * * * *

[DA4206]

The following is a type written statement given by Kenneth Smith, Negro male born 3-19-66, who currently resides at 1736 Marigny Street and his knowledge of facts surrounding the murders of four Negro males tentatively identified as Robert Simon, born 7-26-66, Jimmy Jackson, William, last name unknown and Eian, last name unknown. These murders occurred inside 2230 North Roman Street, on March 1, 1995 about 8:30 p.m. Also shot during this incident was a Negro female identified as Shelita Russell and a Negro male tentatively identified as Larry, last name unknown. This statement was started on March 1, 1995 at 11:20 p.m.

* * * * *

[DA4297]

Q Can you describe the person you referred to as "Marty" and how he was dressed?

A Marty, is Negro male 18 or 19 years old, at least five foot ten, dark complected, he weighs about 165 pounds, slim build, medium hair cut worn in a fade style. He has two upper gold teeth. He was wearing a whiteish baseball style hat, dark blue jacket, blue jeans.

* * * * *

STATEMENT OF MICHELLE BRANCH

[DA4301]

This statement is being taken in regards to the shooting death of Willie Legget, Robert Simons, James Jackson, Ean Jackson, and Shelita Russell, which occurred on the first day of March, 1995, at 8:32 P.M. The statement is being taken . . . , this statement is being rendered by one Michelle Branch, residing 809 St. Mary Street, Apartment "0", New Orleans, LA. This statement is being taken in Miss Branch's home on St. Mary Street.

* * * * *

The questions will be offered by Detective John Ronquillo, and also by detective Joseph Waquespack. Answers will be given by Miss Michelle Branch. The time is 3:59 P.M. The date is March 13, 1995.

Q Miss Branch for the record, would you please state your name, date of birth and address please.

A Michelle Branch, 809 St. Mary's, Apartment "O", 9/20/ of '72.

Q Er, do you have a telephone, Miss Branch?

A Yes, 596-6838.

Q Er, Miss Branch are you currently employed?

A No.

Q Who do you live with?

A Myself and my children.

Q Can you tell me your children's name?

A Kristin, Rashard, and Dadrice Branch.

Q Ok, er Miss Branch, did you know a subject by the name of Philip Young?

A Yes.

Q And er what was your relationship to Mr. Young?

A Boy friend.

Q And did Mr. Young live with you?

A Yes.

Q And do you have any children by Mr. Branch . . . Mr. Young?

A I'm currently carrying, carrying a child now.

Q Okay, er let me bring you back to March 1, 1995 . . . er that was a Wednesday did you happen to see er . . . was Mr. Young at your residence that day?

A Yes.

[DA4302]

Q And what time of the day was he at your house?

A All day.

Q So he was at the house all day, is that correct?

A Yes.

Q Er . . . what time of the day . . . did he leave your house that day?

A Yes he, well he was just downstairs there, out there, and he had a guy working on the car, putting a radio in, and was suppose to do other little things to it.

Q Okay, when you say downstairs . . . in the rear driveway behind your home?

A Yes, it was right there, right downstairs in the driveway.

Q And you could see from your kitchen window, correct?

A Yes, from the kitchen window.

Q Okay . . . er the car that the old gentleman was putting the radio in, was that Mr. Young's car, or your car?

A Mine.

Q Er . . . can you describe that car for me please?

A A light yellow, er, I don't really know the name of the car, but it's a light yellow like at night time, it would look white, but it's a old model LeBaron.

Q That's a LaBaron, like a Chrysler LeBaron?

A Yes, a Chrysler LeBaron.

Q Er, is there anything about the car that would make it stand out, er anything in particular?

A Nothing but the motor, when you start it up, it didn't have a muffler yet, so when you start it up, you can hear it real clear, when it starts up.

Q So the car did not have a muffler, right?

A No.

Q So when you start it up, it would make a loud noise, correct?

A Yes.

Q And when the car was running, could you hear . . . was it still loud?

A Yes.

Q So when you were driving the car down the street, people could tell the car was making a lot of noise, correct?

[DA4303]

A Yes.

Q Er, let me ask you, if you were seated in your house, and someone drove the car into the back drive, could you hear it from your home?

A Yes.

Q And do you live on the second floor?

A Yes.

Q Okay, er . . . do you know the old man that was putting the radio on the car?

A No.

Q And when you looked out the window, it was only Mr. Young and the old man, correct?

A Yes.

Q Er . . . did you see Mr. Young leave?

A No . . . I didn't see him leave, I just, that's why I thought, maybe the car was somewhere, around here, I had no, you know no idea he had took off in the car cause it had a lot of problems, and the guy was suppose to fix the problems, so I'm figuring the car is down here somewhere where these, you know these guys out here they all

work on the cars and stuff to fix things, but it wasn't, so I figured Philip was in it.

Q Did you hear the car leave by the muffler?

A Not at the moment, cause . . . you know by being here distracted with these children, I didn't really know he was gone til I just went to look, and I was like, "Oh he gone, and so must be down here somewhere" . . .

Q He had keys to your car, correct?

A Right, it was just one set, cause we just brought the, I just brought the car a week ago.

Q Miss Branch, what time did you notice that Philip Young was gone with the car?

A It was about 6:30.

Q So that was on March 1, correct?

A Yes.

Q Er . . . do you remember what type of clothes, er Philip had on?

A Burgundy pants, black tennis shoes, and a burgundy white plaid shirt with a burgundy jacket.

Q Okay, er did Philip have a nick name?

A Yea, Shack.

[DA4304]

Q And how do you spell that?

A Shack.

Q And did he have a tattoo of that anywhere on his body?

A Yes, left arm.

Q Okay, so he left your home, you said around 6:30 in the car, is that correct?

A Yes.

Q And haven't you seen him or the car since that night?

A No.

Q Er . . . do you know what happened to Philip?

A I know he has been shot, that's all.

Q And is he currently confined to Charity Hospital?

A Yes.

Q And er . . . have you talked to his family?

A Yes.

Q And there is no doubt that that's Philip that's in the hospital, correct?

A Yes.

Q Okay, er let me ask you another question Miss Branch, you said you haven't seen your car since that night, correct?

A Correct.

Q Er . . . has anyone seen your car?

A I have had phone calls that people have seen someone driving around in it, which they say it's the boys, but I'm figuring you know by everyone, they had, it's a lot or rumors out here that it was kintash . . .

Q Okay, so you have heard a lot of rumors, plus phone calls that Kintad, is that Kintad Philips who is driving your car?

A Yes.

Q And you know Mr. Philips, Kintad Philips and any of his friends as you say, the gang, do you know their names?

A Meaning who?

Q Er . . . who would Kintad, er who would Kintad run with, say his gang?

A Fats, just Fats.

Q Do you know Fat's real name?

A No.

[DA4305]

Q Er . . . okay . . . so it would be Kintad and a subject named Fats, is that correct?

A Yes

Q Did you know er Philip to er run with Kintad Philips or Fats?

A Never.

Q So when he left here that day, he was alone, correct?

A Yes

Q And had he ever brought friends to the house here?

A Yes

Q And do you know their names?

A No not really . . . they just younger guys, lil guys, they mostly play football together, that's it, I never really knew their names, cause I didn't really liked them, I turn 'em you know, so they wouldn't come too far in here anyway . . .

Q Okay, when you say younger guys, about how old were they?

A They were like Shack age, 18, from like 16, 15 to 18.

Q And why didn't you like them in your home?

A It's just, I have girls in here, that's I don't allow all that, too many men and all that.

Q Okay, but you weren't afraid of them or anything were you?

A No.

Q It's just that they could cut up and do men things, and you thought it would offend your children, correct?

A No not really, its just I don't like traffic, period, so I kept all that out of here, you know they stay outside and wait til he come.

Q Okay, er you said you got a phone call, do you know who made the phone call to you about Kintad driving the car?

A No, it was about 3:30 in the morning, ever since all this happened, I get . . . I'm liable to get any kind of phone call.

Q Okay, did they say that er anything particular haven't changed about the car, in particular . . . a license plate?

A Just that they had a license plate in the window, cause I know the car didn't have a license plate, cause it had, you know I just bought the car, so I was still working on getting all that done.

[DA4306]

Q Were there any bumper stickers on the car that you remember?

A No, no bumper stickers.

Q And no school insignias, or school signs in the back window?

A They have on the windshield, they have a Zoo, the Zoo sticker, yea, just a Zoo sticker on the windshield, where, maybe whoever the owner was before put on there.

Q Okay, er Miss Branch, did you ever know Philip to have a gun?

A No.

Q You never saw him with any type of weapon at all?

A No.

Q And do you ever known him to be in trouble before?

A No.

Q Okay, er Detective Waguespack, is there any thing you would like to add?

A Er, No.

Q Okay, the time is 4:07 P.M. The date is March 13, 1995. This concludes the statement of one Michelle Branch.

PETITIONER'S EXHIBIT 2 FROM HEARING ON PETITION FOR POSTCONVICTION RELIEF (DAILY NOTES AND STATUS REPORTS OF NEW ORLEANS POLICE DEPARTMENT)

* * * * *

[3]

3-6-95

2:30 pm: Larry Boatner — saw three n/m coming in — guy on floor had to be with them making four guys — when left heard three doors slam — and car with bad muffler drove off — got up and saw people shot — could not ID anyone because couldn't see faces — Rebie in back room — heard Rebie open door — don't know Marty — glanced at 1st one — saw man — through door — can't tell if had faces covered didn't see anyone —

Could identify car if running — .25 —

Microwave — no dope — heroin —

Saw 3 n/m come in and hit me in head — laid on ground pretended to be shot — closed eyes and waited for a bullet —

Could not ID — would not know them if — I saw them —

[Marginalia: Dukie — cousin — Marty — Tankman — Alvin —]

[6]

6:20 pm: Dale Mimms 11/7/50 2218 N. Roman No plts — heard shots, plenty — looked out door saw 3 n/m — 3 with AK's get in white car, Buick/Olds 4 door — heard 3 shotgun blast — 4th guy came out drove off

All wearing mask — mask ski type covers whole face — can't remember clothes

4th subject didn't see him get in car — drove to Elysian Fields right — saw 4 n/m in car w/ mask = NVD on subjects

Just remember guns — all rifles — one w/ banana clip

[Marginalia: 70-80 Big car]

[44]

Face down perp — victim #3 lying on hands and wrist of perp

Female — face down against cabinets — conscious —

Said — in kitchen saw people barge in — one — black cloth across face — first one through door — nfs

[56]

2:10 pm: Miranda — B. Riley present —

Acknowledged understood rights —

Short Dog/Bucko/Fats — No — Didn't shoot me
No — Not with me
when went to house

Yes — one of people in house shot me

No — Not responsible — 'Posse'

Didn't drive to house — 'Posse'

Yes —Knows names of perps

Yes — Drove in car —

Yes — girlfriends car —

[Marginalia: Doctor Howard Kate 412-0044]

[105]

Follow-up Daily

Gist:

On Sunday, February 02, 1995 at 2:50 p.m., a sister of Ms. Tangie Thompson arrived at 8130 Morrison Rd. After receiving no response to her knocks at the front door of the residence she went to the rear patio area. Again she knocked: after receiving no response she looked into the residence where she noticed what she believed was the body of Ms. Thompson laying on the floor inside of the residence. She also noticed what appeared to be blood stains on the patio door. She relocated to a neighboring residence and phoned for the assistance of the police.

Arrested Subject:

Smith, Juan Akiley, AKA "Short Dog", B/M, DOB 08-28-74, SS# 438-27-9683, residing at 1942 Annuciation St., N.O., La., res. phone: unknown.

Location of Offense:

Inside of the residence located at 8130 Morrison Rd.

Date and Time of Offense:

Sunday, February 02, 1995

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

Transcript in the Above Entitled Matter, as Heard Before the Honorable Frank A. Marullo, Jr., Judge Presiding, Under Date of January 13, 2009

Appearances:

Donna Andrieu, Esq. Alyson Grangnard, Esq.	Counsel For The State Assistant District Attorney
Kathy Kelly, Esq. Kristen Stanley, Esq.	Counsel For The Defense

* * * * *

TESTIMONY OF FRANK LARRE

[4]

BY MS. KELLY:

Q Sir, please state your name for the record.

A Frank Joseph Larre, L-A-R-R-E.

Q Okay.
Mr. Larre, what is your profession?

A I am a trial lawyer.

Q Okay.
And, how many years have you been practicing law in Louisiana?

A Thirty-four (34).

Q Does your practice include representing defendants that are accused of committing crimes?

A Yes.

Q Okay.
In 1995, were you appointed to represent petitioner Juan Smith in any legal matters?

A Two first degree murder cases.

Q Okay.
And, can you tell me which case was tried first?

[5]

A The Roman Street murders.

Q And, what was the result for the trial?

A He was convicted on, I believe, five counts of murder and sentenced to life on each count, no death penalty.

Q Okay.
And, did you do any further legal work for Mr. Smith?

A Yes, ma'am.

I represented him on the case out of New Orleans East where he was accused of murdering three people, Tangi Thompson, her son, and Andre White (all proper names are spelled phonetically).

Q Okay.

BY THE COURT:

That was also in 1995, right?

BY THE WITNESS:

Ninety-five, ninety-six.

BY THE COURT:

Ninety-five, ninety-six.

And, the first case that you represented him on was on the five defendant case, right?

BY THE WITNESS

Yes, sir, five victims.

BY THE COURT:

The five victim case.

And, the second one was the Tangi Thompson case?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

Okay.

BY MS. KELLY:

Yes.

Q I'd like you to refer, just to make it easier, refer to the case that — for this hearing as the Roman Street case, and the later case as the Morrison [6] Road.

A Okay.
That's fine.

Q Okay.
Was the conviction in evidence of the Roman Street murders introduced in the penalty phase of the Morrison Road case?

A Yes, ma'am.

Q And, in that penalty phase, did the State argue that Mr. Smith has previously shot and killed five people in this case?

A Yes, ma'am.

Q Okay.
And, were you assisted by co-counsel on either of these cases?

A I didn't have an appointed co-counsel. I had an associate who was employed by me by the name of Samuel Bearsley (spelled phonetically) to give some help but not a whole lot.

Q Okay.

BY THE COURT:

Samuel Bearsley, you said?

BY THE WITNESS:

Beardsley, B-E-A-R-D-S-L-E-Y.

And, that was on the Roman Street case. I don't think he assisted me in the Morrison Road case.

BY MS. KELLY:

Okay.

Q And, did you have an investigator appointed to assist you in either case?

A Yes. Sidney Rain (spelled phonetically). He was a retired New Orleans Policeman.

Q Okay.
And, can you recall what he — what role or what he did in the case?

A He interviewed witnesses that we knew about and helped to serve some subpoenas and things of that nature.

[7]

Q Okay.
And, at the time that you represented Mr. Smith, do you know how many capital cases you had previously handled?

BY THE COURT:

That Mr. Larre previously handled?

BY MS. KELLY:

Yes.

BY THE COURT:

Okay.

BY THE WITNESS:

About thirty-six, I believe.

BY THE COURT:

Thirty-six?

BY THE WITNESS:

I have done forty-two total, and I think it was about thirty-six when I represented him.

BY MS. KELLY:

Okay.

Q With regard to the Roman Street trial, what was your defense theory of the case?

A That Mr. Smith didn't do it.

Q Okay.
And, what evidence did the State present that Mr. Smith participated in this crime?

A Eye witness testimony by Mr. Program (written phonetically) and some of the circumstantial kinds of things. They had no direct evidence. They had no weapon. They had no fingerprints and no property taken from the place, nothing.

Q Okay.
And, your follow-up of Mr. Bibin's (spelled phonetically) testimony was?

A His testimony was that he observed Mr. Smith come into the door first [8] and actually I believe was struck by Mr. Smith or pushed down to the floor.
And, that Mr. Smith has a big gun.

BY MS. ANDRIEU:

Your Honor, the State is going to object right now.

First of all, the record is the best evidence of Mr. Boatner's (spelled phonetically) testimony.

BY THE COURT:

I agree.

BY MS. ANDRIEU:

Second of all, this is actually misrepresentation of Mr. Boatner's (Spelled phonetically) testimony.

BY THE COURT:

Well, I think that the testimony as it was typed and taken down by the stenographer is what I will consider.

The recollections of the witness or the attorney representing him, I think is of no merit.

So, I am going to say that is improper questioning of the witness.

BY MS. KELLY:

All right.

Q Can you recall that the State presented any other eye witnesses other than Larry Boatner?

BY MS. ANDRIEU:

Again, Your Honor, objection based on the best evidence rule.

The record in this case is the best evidence.

BY THE COURT:

What he recollects is not important. It is whatever is in the record.

Why are we going to the second hand for him to recall what was said.

BY MS. KELLY:

Okay.

I will rephrase it, Your Honor.

Q I can just say that isn't it true that no other eye witnesses identified Mr. Smith —

[9]

BY MS. ANDRIEU:

Objection, Your Honor.

Leading.

BY MS. KELLY:

Well, if you are not going to let me ask him what he recalls of the testimony, how —

BY THE COURT:

Okay.

Let me simplify this.

If you are asking him what he remembers and there is a document that is already in the transcript, then his memory in that respect is not relevant because you already have exactly what took place in the transcript.

Now, if there is something else auxiliary to that, I will let you ask some questions, but his memory is not the best evidence here. The transcript is when you are asking him those particular instances.

BY MS. KELLY:

Okay, Your Honor.

I'll move on.

Q Mr. Larre, were you aware that police had interviewed an eye witness, Dale Muse (spelled phonetically) who saw all the men running from the house right after the shooting?

A No, ma'am.

BY MS. KELLY:

Your Honor, at this time, I'd like to have petitioner's exhibit one marked for identification.

Please let the record reflect that I am showing it to opposing counsel. And, Exhibit One is what was attached as exhibit one to petitioner's postconviction petition, which is documents obtained from the D.A. file.

At this time, Your Honor, I'd like — and also at this time, petitioner [10] would like to introduce to be marked for identification petitioner's exhibit two.

Let the record reflect that I am showing it to opposing counsel, which was petitioner's exhibit two to this postconviction petition and is identified as "Daily Reports and Status Reports" that petitioner received from the New Orleans Police Department.

At this time, Your Honor, I would request permission to approach the witness to show him the exhibits.

BY THE COURT:

Yes.

BY MS. KELLY:

Q Mr. Larre, would you please look at what has been introduced as Exhibit Two, page six? And, can you read from the notes that start three, six, ninety-five, six twenty p.m.?

A Dale Muse, eleven, seven, fifty, twenty-two, eighteen, Roman, NOPD — (all written phonetically).

BY THE COURT:

Are these notes Officer Ronquillo's (spelled phonetically) notes?

BY MS. KELLY:

Yes, they are, Your Honor.

BY THE COURT:

Okay.

BY THE WITNESS:

"Heard shots. Plenty shots. Looked out door. Saw — scratched out — two or three negro males. Three with AK's get in white car, Buick Oldsmobile, four door. Heard five or six shots gun blasts with a fourth guy came out, drove off, all wearing masks.

Masks, ski type, covers whole face, can't remember clothes.

Fourth subject didn't see him get in car. Drove to Elysian Fields [11] Street. Right. Saw Fourth negro male in car with mask."

I think it is "NVD" (written phonetically) on subjects. Just remember guns all rifles, one with banana clip."

BY MS. KELLY:

Q Mr. Larre, were you ever provided notes of this police interview with Dale Mims (spelled phonetically) prior to or at any point during the trial?

A No, ma'am. The first time I saw this was when you gave it to me a month or so ago.

Q Okay.
And, if you had been provided this, how could you have used this information?

A Well, of course, it would have been used for either impeaching the one witness who said the people didn't have masks on and could identify my client.

Also it would indicate that this man said that all four people had rifles, and I think that in Mr. Boatner's (spelled phonetically) testimony he said that he was hit with a handgun.

Q Okay.
And, were you aware that any of the other victims had given the police a description of the gunmen?

A No.
Okay.
Who was Shalitta Russell (spelled phonetically)?

A I believe she was one of the victims.

Q Isn't it correct that she died later on at the hospital?

A That's what I learned, yes.

Q Were you aware that Shalitta Russell described any of the armed gunmen to the police?

A No. I was under the impression — I didn't know that she had described them.

Q Okay.
Could you please look at page forty-four?

[12]

A All right.

Okay.

Can you read the notes at the top of the page that start off with "Face down"?

A "Face down perp. Victim number three's. lying on hands and wrist (written phonetically) of perp.

Female face down against cabinets, conscious. Said in kitchen saw people barge in. Black cloth across their face."

BY MS. ANDRIEU:

Your Honor, the State is going to object at this point because the Defense has failed to lay a propre foundation.

First of all for purposes of the record, any appellate Court reviewing this hearing will not understand what Mr. Larre is testifying to.

At this point, also, the State is going to re-urge an objection that we urged at the time — or it was actually after — these notes were produced.

First, we do stipulate that these are the handwritten notes of John Ronquillo, but just for record purposes we are going to object to their admission at this hearing because they should not have been turned over based on work product exclusionary rule.

But, at this time the objection is a proper foundation has not been laid.

BY THE COURT:

I am going to overrule your objection.

BY MS. KELLY:

Okay.

I am sorry.

I believe that —

BY THE COURT:

You have stipulated that these are Ronquillo's notes.

BY MS. ANDRIEU:

Yes.

[13]

BY THE COURT:

I think embodied in that stipulation we are saying that these are Ronquillo's notes. I don't see any reason why then that he shouldn't read from them.

BY MS. ANDRIEU:

I think that we are just asking for clarification when he is reading as to where he is reading from.

BY THE COURT:

He did identify — the attorney identified where he was to read from.

BY MS. ANDRIEU:

Okay.

BY THE COURT:

Would you re-identify where you are reading from so that everybody is on the same page here?

BY MS. KELLY:

Yes.

This is previously introduced exhibit two at page forty-four.

BY THE WITNESS:

Just for the record, I am reading from what is identified as page forty-four on the bottom right hand corner of the page.

BY THE COURT:

Okay.

The bottom of page forty-four is where he is reading from.

BY THE WITNESS:

No, I am reading from the top. The number forty-four is on the bottom right hand side.

That is how I am identifying this page as page forty-four.

BY THE COURT:

Okay.

BY MS. KELLY:

Okay.

Q I believe you had stopped where it said, "Black cloth across face."

[14]

Can you continue?

BY THE COURT:

And, these comments are allegedly made from the notes taken from Ms. Shalitta Russell?

BY MS. KELLY:

Yes, that is correct, Your Honor.

BY THE COURT:

Okay.

BY THE WITNESS:

It says, "Black cloth across first one through the door."

BY MS. KELLY:

Q Okay.

Mr. Larre, were you ever provided the notes of this police interview with Shalitta Russell prior to or at any time during the trial?

A No, ma'am.

Q And, isn't it correct that, in fact, a police witness testified that Ms. Shalitta Russell never gave them any details?

A That's correct.

Q How could you have used this information if you had been provided it?

A Again, I would have been able to reinforce the fact that Mr. Boner could not have identified anyone because — or he had identified my client as the first one through the door and this lady evidentially in a dying declaration has said that the person coming through the door first had a black cloth on his face and she couldn't identify him. It seems to be great impeachment evidence against Mr. Boatner.

Q Okay.

And, would Dale Mims and Shalitta Russell's

statements to the police have supported your defense strategy in this case?

A It absolutely would have indicated exculpability of the ability to make any identification that Mr. Boatner made.

Q Were you aware that Larry Boatner initially told the police that he could not identify anyone and was not sure if they were all wearing masks or [15] not?

A That's correct. I was not aware of that.

Q Okay.

BY MS. KELLY:

At this time, Your Honor, I would like to request permission to approach the witness and show him petitioner's exhibit one.

BY THE COURT:

All right.

BY MS. KELLY:

And, again, for the record, petitioner's exhibit one are documents that were turned over to petitioner during postconviction from the D.A.'s files.

BY THE COURT:

Where are you getting the information on Larry Boatner from?

BY MS. KELLY:

This is from the D.A. files that we got in the public records request which were —

BY THE COURT:

And, you are saying that they are in the record from the D.A. saying that Mr. Larry Boatner could not identify anybody?

BY MS. KELLY:

Yes.

And, I would have the witness look at the pages, part of the statements, most of them come from a supplemental police report that was in the D.A.'s file.

Q And, if you would look at page thirty-seven, twenty-nine of the D.A. File.

A Just for identification, I am looking at a packet of papers and the first page says "Charity Hospital" at the top. "Petitioner's Exhibit One" at the bottom. All of the pages are numbered. D.A., zero, zero, starting at two, zero, five, three, and they go down — to the one that I am going to now on the right hand corner, it is typed in in the right hand corner, D.A., zero, zero, [16] three, seven, two, nine.

And, the top of that page says, "New Orleans Police Department, Homicide Division, Continuation Sheet, Item C-17, seventy-one, ninety-five, page twenty of eighty-three.

Q Okay.
Can you please read where it states, "Boatner described"?

A "Boatner described the guns as being one AK type assault rifle, one Tech Nine type handgun, and silver colored handgun. Boatner could not supply any additional information on the weapons or supply a description of the perpetrators other than they were black males."

Q Okay.
Can you now turn to page forty-two, eighty-five? And, can you read, "Of petitioner's exhibit one"

A Forty-two, eighty-five?

Q Yes.
Okay.
Can you start where it says, "I was to"?

A Okay.

For identification purposes I am reading from a document that says, "D.A. zero, zero, four, two, eight, five, on the bottom right hand corner.

And, on the top is says, "Page two of three, statement of Larry Boatner, item C-17, seventy-one, ninety-five."

And, in the middle of the second paragraph, it says, "Can you describe the subject who shot the people in the house? I can tell you about one, the one who put the pistol in my face. He was a black male. — "

Q I'm sorry.

You are looking at —

Can you look at the paragraph that starts, "I was"?

A That was in the middle of the paragraph.

Q Okay.
I'm sorry.
Go ahead.

[17]

A It says, "I was too scared to look at anybody. I was too scared to look at them."

BY THE COURT:

Is this Mr. Boatner?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

All right.

BY MS. KELLY:

All right.

Q Can you now look at page thirty-seven, forty-nine of the same document?

A All right.

Okay.

I am now looking at a page that says, "D.A. zero, zero, thirty-seven, forty-nine, the bottom right hand corner, page forty-one of eighty-three, item number C-17, seventy-one, New Orleans Police Department Homicide Division Continuation Sheet."

And, one, two, three, four paragraphs — five paragraphs down, it says, "At four p.m. Ronquillo contacted Larry Boatner and somebody Espadron (written phonetically). Somebody. I can't read it. It is too pale in the copy. Somebody named Espadron and a telephone number.

BY THE COURT:

Espadron?

BY THE WITNESS:

E-S-P-A-D-R-O-N.

It has a first name, but I can't read the first name.

BY THE COURT:

All right.

BY THE WITNESS:

"At telephone number 943-7957, now residing at 2009 Touro Street, New Orleans, Louisiana. Both subjects advised Ronquillo that [18] they could not identify any of the perpetrators of the murder."

BY MS. KELLY:

Okay.

Q Now, could you please go back to exhibit two, which has been identified as the dailies and handwritten notes of the New Orleans Police Department and look at page three?

A All right.

I am now looking at something at the top that says, "Three, six, ninety-five." At the bottom it is typed in, "Number Three" in the lower right hand corner. The underlined part says, "Two thirty p.m., Larry Boatner saw three negro —" I assume that is negro males. It says, "N" and a slash and "M". "Coming in. Guy (spelled phonetically) on the floor had to be with them making four guys. When left heard —

Q I'm sorry. I'm sorry.

Could you go to the part, and we will get to the other later, but could you go to the part where it states —

A I am five lines down from two thirty p.m.

It says, "Could not ID anyone because couldn't see faces. Glanced at first on (written phonetically). Saw man through door. Can't tell if had face covered. Didn't see anyone."

Then two, four, six, seven, eight lines down from that, "Could not ID. Would not know them if I saw them."

Q Okay.

If you had been provided these police interviews, how would this have supported your defense?

A Well, it would have totally contradicted what Mr. Boatner was testifying to under my cross examination.

It certainly was a previous statement that is inconsistent to what he was saying in court. It would have been very, very exculpatory.

Q Okay.

And, isn't it correct that the other — what the other surviving witnesses, Reva Espadron (spelled phonetically) said that the only man she [19] saw was wearing a mask?

A I believe it was a black cloth on his face, yes.

Q Okay.

And, she also described that man as carrying a big gun?

A Yes.

Q Were you aware that Larry Boatner initially described the weapon that — of the man that he identified as Juan Smith was carrying a big chrome automatic?

A I wasn't aware that he said that before he testified in court.

Q Now, in fact, he described at trial that Mr. Smith was carrying a nine millimeter?

A Correct.

Q Could you look at exhibit — go back to exhibit one.

BY THE COURT:

Where are you getting the information about the chrome gun?

Where are you talking from? From what?

BY MS. KELLY:

Okay.
I am going to that.

BY THE COURT:

Identify what you are talking about.

We have D.A.'s notes here. We have police —

BY MS. KELLY:

Right.

This is Exhibit One at forty-two, eighty-five, which is the D.A.'s file.

Q And, Mr. Larre, if you could — I believe — identify it where it says at the top that it is a supplemental police report.

A It says at the beginning —

BY THE COURT:

And, who is identifying this as a chrome gun?

BY THE WITNESS:

Mr. Boatner.

[20]

BY THE COURT:

Mr. Boatner is identifying a chrome gun.

BY THE WITNESS:

What is says on the top of the page —

BY THE COURT:

Does it say a revolver or does it say what type of gun?

BY MS. KELLY:

Yes.

If Mr. Larre could read out loud that stars, "One perpetrator had".

BY THE WITNESS:

Do you know what line?

BY MS. KELLY:

Q Here.

A Let me describe the page so that everybody is clear.

This is D.A. zero, zero, four, two, eight, five, on the bottom right hand corner.

The top of the page starts of page two of three, statement of Larry Boatner, item C-17, seven, one, nine, five.

Second question, "Can you describe the subjects who shot the people in the house?" Answer, "I can tell you about one, the one who put the pistol in my face. He was a black male. I was too scared to look at him." —

Q No, no.

I'm sorry.

BY THE COURT:

Wait. Wait.

BY THE WITNESS:

"I was too scared to look at anybody. I was too scared to look at them. It was a — One had an AK. One had a nine tech. The one who hit me had a chrome automatic. It was big."

BY MS. KELLY:

Okay.

BY THE WITNESS:

[21]

That would be one, two, three, four, five — starting on line five of question two.

BY MS. KELLY:

Q How is this different than Mr. Boatner's trial testimony?

A (No response.)

Q Do you recall?

A I think the only thing he testified in his trial, after reading the transcripts that you provided me, was the nine millimeter handgun.

Q Right.

And, in this initial statement, he did not say that Mr. Smith had a nine millimeter. He said one of the other suspects had a tech nine, isn't that correct?

A Correct.

Q Okay.

And, also Reva Espadron said that the man she saw wearing a mask was carrying a big handgun?

A Correct.

Q Okay.

So, if you would have had this statement of Mr. Boatner's where his initial statement was the man he alleged was Mr. Smith was carrying the big chrome automatic, could you have used that information?

A Well, that is different than what I read in the transcript as he described it when I cross examined him. He just said that it was a nine millimeter.

Q And, wasn't the significance of placing Mr. Smith having a nine millimeter was that the victims were allegedly shot and killed with the perpetrator carrying a nine millimeter?

BY MS. ANDRIEU:

Objection, Your Honor.

Leading.

BY THE COURT:

I'll permit that.

BY THE WITNESS:

[22]

Yes, ma'am.

BY THE COURT:

Go ahead.

I know that it is leading, but if it is in the record —

BY MS. KELLY:

It is in the record.

Q And, wasn't in the capital trial that the basis, since no one saw who the shooter was, wasn't Boatner's testimony that Mr. Smith was carrying the nine millimeter the basis for the prosecution arguing in the capital case that Mr. Smith was the shooter and previously shot five people?

BY MS. ANDRIEU:

Objection, Your Honor.

BY THE COURT:

Objection sustained.

That is a whole litany.

I said that it was leading, but it was in the record, but I am not going to let you just supply the answers.

BY MS. KELLY:

Okay.

I'm sorry.

BY THE COURT:

Just ask him questions.

BY MS. KELLY:

Okay.

BY MS. ANDRIEU:

Your Honor, the State for record purposes, would also object on the basis that the record is being improperly or wrongly summarized.

It is being mis-stated.

BY THE COURT:

Let's go.

BY MS. KELLY:

[23]

Okay.

All right.

Q Now, as part of your defense, did you question the circumstances surrounding Mr. Boatner's identification of Mr. Smith?

A Yes, ma'am.

Q Yes.

And, as part of your defense, did you try to determine if Mr. Boatner had been harassed or coerced in any way to make an identification?

A Yes, ma'am.

Q Okay.

And, at this point I would like — Were you aware at any point that Mr. Boatner's medical records had stated that he was being harassed by the detective to make an identification?

A No, ma' am.

Q Could you look, please, at D.A. — what has been labeled as petitioner's exhibit one, documents obtained by the D.A. file, and look at page two, zero, seven, nine?

A That would be the second page in a group of documents that I have. It says, "D.A. zero, zero, two, zero, seven, nine" on the bottom. And, on the top it says, "Notes." And, it has a name. It is Tamy or Tony Hosner (spelled phonetically). It is dated 6/27/95.

BY THE COURT:

Tammy, you said?

BY THE WITNESS:

Tamy or Tony. I think it is Tamy, T-A-M-Y.

And, in the middle of the page, it is six, twenty-eight, ninety-five, at ten. It doesn't say a.m. or p.m.

It says, "In order to —"

BY MS. ANDRIEU:

Your Honor, the State is going to object to hearsay in this matter.

This is not — In other words, with exhibit two that was introduced earlier, we stipulated that those were John Ronquillo's notes.

[24]

There is no foundation laid for this document. And, asking Mr. Larre to read the document is admitting hearsay.

BY THE COURT:

Objection sustained.

I am sustaining your objection.

BY MS. ANDRIEU:

Thank you.

BY MS. KELLY:

No, Your Honor, if I could make a point.

These are — They haven't been identified.

This is Mr. Boatner's Charity records that — Charity Medical Records that were obtained from the D.A.'s file.

They contained exculpatory information regarding the identification.

BY THE COURT:

Who wrote those notes?

BY MS. KELLY:

We are calling a witness tomorrow.

There is a woman who is at the bottom —

BY THE COURT:

Well, that is the proper person to identify the notes then.

BY MS. KELLY:

They were certified records that were introduced at the time of the trial, part of them by the State, although — So, we are trying to determine, and that is why I am putting on another witness from Jane Mills (spelled phonetically).

There is a name that — and I can have Mr. Larre read it —

BY THE COURT:

All right.

So, you are asking Mr. Larre about those notes that were introduced in the trial?

BY MS. KELLY:

Part of the notes were introduced.

[25]

BY THE COURT:

Was the part that you are asking about, was that introduced in the trial?

BY MS. KELLY:

No, they were not, Your Honor.

But at the end of the notes, it identifies a woman and the name says Anna — and the signature is hard to read, which I am going to put on a witness tomorrow, who is the — She is in the Psyche (Spelled phonetically) Unit.

BY THE COURT:

So, you are asking Mr. Larre —

BY MS. KELLY:

These are the actual certified records that Charity Hospital turned over —

BY THE COURT:

Yes, I know —

BY MS. KELLY:

— as a result of a Court Order.

BY THE COURT:

I understand that, but still you are asking this witness about some notes that happen to be at Charity Hospital. And, I know that there are exceptions to the hearsay rules, but here we are talking about notes that somebody who we can't even identify who they were.

So, I am sustaining the State's objection.

BY MS. KELLY:

Well, Your Honor, if I could approach the bench, and you could look at the signature.

The only indication — it does say that these notes were made from a personnel that was a part of the acute psyche unit (spelled phonetically), Anna, and the signature is hard.

BY THE COURT:

[26]

Anna isn't a signature, and I am not going to permit you to get into that.

BY MS. KELLY:

Then I would like to have Mr. Larre answer the questions and proffer it for appeal.

In Chambers versus Mississippi, even the hearsay gives you the right —

BY THE COURT:

I am aware of Chambers versus Mississippi, and I am not doing it.

BY MS. KELLY:

I have the right to proffer his testimony.

BY THE COURT:

Nope.

Go on.

You make your objection and go on.

BY MS. KELLY:

Okay.

Q Mr. Larre, if you were aware that there were documents —

BY THE COURT:

Ma'am, give me Chambers versus Mississippi.

Go ahead.

BY MS. KELLY:

Okay.

Q If you were aware that there were witnesses or that there were documents that stated that Mr. Boatner had been visited hours before he had made the identification and stated that he was being harassed, would you have attempted to locate those witnesses and call them to testify to that?

A Absolutely.

Q But, were you ever provided any of this information from the prosecution?

A No.

Q Okay.

[27]

Also, Mr. Larre, if you were aware that in — that there was also potential witnesses that had written that Mr. Boatner had told them that the day before he made the identification that the suspected killers of his friends were identified but not yet in custody, would you have attempted to locate who made these notes at Boatner — at Charity Hospital and called them as witnesses?

A Absolutely.

Q But, you were never provided this information at trial?

A No.

Q You filed a Brady request with the State seeking any exculpatory information?

A Absolutely.

Q Is that correct? Brady encompasses impeachment material of a witness in a case? Is that correct?

A That is my understanding of the law, yes, ma'am.

Q Now, you did file a motion to suppress Mr. Boatner's identification in this case?

A Yes, ma'am. We had a formal hearing on it.

Q Correct.

But, none of the testimony that we have discussed over these reports were used in your motion to suppress, is that correct?

A No, ma'am, not that I recall.

Q And, why weren't they?

A I didn't know about it.

Q Okay.

And, had you been informed, you would have done further investigation and tried in an attempt to put on these witnesses?

BY THE COURT:

Are you going to answer the question for him?

BY THE WITNESS:

I not only would have attempted to locate this witness, if I couldn't locate the witness, I would have attempted to introduce these [28] documents as a defense evidence showing that the police had reports indicating that there were claims of police harassment to identify with the witness.

BY MS. KELLY:

Okay.

Q Now, Mr. Larre, who was Phillip Young?

A Phillip Young was one of the players in the trial. I don't remember exactly which one at this time off the top of my head.

Q Okay.

And, was Mr. Young charged and convicted of this crime?

A I honestly don't remember. I apologize.

Q Okay.

If you could look at page fifty-six of what has been introduced as petitioner's exhibit two, which is the handwritten notes of Detective Ronquillo, could you look at that exhibit and go to page fifty-six?

A All right.

I have a document here —

Q Yeah.

If you would look —

A It is fifty-six at the bottom right hand comer. On the line — from the top to the bottom — from the bottom at two, ten, p.m., it says, "Miranda B. Riley (spelled phonetically) P-E-A-S-A-N-T, Peasant acknowledgment understood rights."

Q Okay.

I'm sorry, Mr. Larre.

Just for identification purposes, can you look at the top of the page?

A Okay.

Q Identify —

A Seventeen, seventy-one, dash, ninety-five, date six, twenty-five, fifty — fifteen.

Q Okay.

Can you — And, this has been identified previously as handwritten [29] notes taken from John Ronquillo. At the top of the page, could you just start reading where it says at 11:30 a.m.?

A "Barbara Riley, (spelled phonetically), three, six, three, seven, five, five, two, Young (written phonetically) talk, left hand out of coma, about one week. Follow commands. Simple commands. Uses left arm and left hand. Sits in wheelchair with support. Feel he understands what is being told to him. Talks more to family. Can't eat. Bladder and bowel functions can't control. Barbara Riley —"

Q Okay.

And, then if you can jump down now to it then states an address that Barbara Riley — I'm sorry — go ahead and read where she is from?

Underneath her name.

A I see Miranda B. Riley, Pleasant, acknowledges understood rights, short, dog, bucko, fat, (all written phonetically) no didn't shoot me (all written phonetically). Did not shoot me. No.

Not with me when went to the house. One of people in house shot me. No, not responsible. Posse. (Written phonetically) Not responsible. Didn't drive to house. Posse. Yes, knows names of perps (written phonetically). Yes, drove in car."

Q Okay.

Thank you.

Did the State provide you with any of these notes of the interview with Phillip Young prior to or during the trial?

A No, ma'am.

Q Okay.

And, if you had had this information, how would you have used it?

A Well, it certainly would be indicative of the fact that the — one of the people shot and admits to being a participant. Denies that Short Dog, who was alleged to have been my client, participated in the robbery and murder and did not shoot him.

Q Okay.

Thank you.

[30]

And, Mr. Larre, could you tell us who Robert Trackling is?

A Robert Trackling was one of the people who was involved allegedly, I believe, in both of the incidents. And, ultimately I believe he was in possession of the murder weapon.

Q Okay.

And, was Robert Trackling ever charged in the Roman Street murders?

A No.

Q Okay.

Were you aware that Eric Rogers, who was a cell mate of Robert Trackling told police

detectives that Mr. Trackling had confessed to participating in the Roman Street murders?

A No, that was never told to me.

Q Okay.

Sorry.

BY THE COURT:

And, where is that coming from, ma'am?

BY MS. KELLY:

I'm sorry, Your Honor.

I am looking — I lost my place.

I'll have it in a minute.

BY THE WITNESS:

I can also say that I represented Eric Alainer, (spelled phonetically) who was a co-defendant with Eric Rogers in a murder case that was heard in front of Judge Waldron. And, in that case there was talk about some witnesses in this case, but was never given the statement that Eric Rogers had evidence in this case in either case — even though I was —

BY MS. KELLY:

Okay. Okay.

I'm sorry.

Thank you, Mr. Larre.

So, you have had previous experience with that.

[31]

BY THE WITNESS:

Yes.

BY MS. KELLY:

Okay.

Q Could you look at where this information comes from — is in Exhibit One, pages thirty-nine, fifty-six, which is a supplemental police report. And, could you look at that, Mr. Larre, and start where the question — look at thirty-nine fifty-six, where it is highlighted.

A That would be exhibit one, not two?

Q Yes, exhibit one.

A All right.

On the bottom of the page I am looking at —

Q Okay —

A It says, "D.A. zero, zero, three, nine, five, six.

Top of the page says, "New Orleans Police Department Homicide Investigation page ten of forty-four, item number BOA (written phonetically) one, seven, two, dash, nine.

Q Okay.

Would you start with the question at the beginning of the page?

A "In your own words, why don't you tell me what knowledge you possess about these two crimes. Start from the beginning when you first learned the information, from whom you learned the information from, and where you were."

Answer, "All right. I was —"

Question, "Again, I have to tell you to speak up."

Answer, "All right. I was on C-4, and I got the information from Robert. He came up on me (something inaudible) where I am at. And, he told me about the first crime that they done. He said that they done it on North Roman. He said that it was him. Fat Buckle (spelled phonetically) and a guy that they call Short Dog. He said that they went up to the door and they knocked on the door and the guy opened the door. They went in the house, and they had about seven guys in there. And, they made them lay down on [32] the floor. And, they were asking the guys where's the stuff and the guys didn't say nothing. And, he said that they had a girl in the other room. She opened the door, and when she opened the door, all of them turned around. And, he said that one of the guys that was on the floor jumped up and grabbed his gun from underneath his shirt and he went to shooting at her. They said that they raised up the gun and they went to shooting them. They went to shooting back and hit them. And, he said that one of the guys who was shooting had got off the floor. His gun slid by Darnel Banister's foot, and Darnel Banister picked up this gun and went to shooting the guy with that gun. Then what transpired then, what happened, then after that he said that they left. They left because they couldn't stay long because they had too much of the noise from the gun fire. They had too much of the noise and they had left."

Do you want me to continue?

Q No, that's fine.

Did the State provide you with this interview when you were conducting Mr. Smith's trial?

A No.

Q Were you aware that Robert Trackling had ever confessed and designated Banister as the shooter?

A No.

Q The — there were three people by all accounts, there are only three people in the house, is that correct?

A Correct.

Q So, if you would have had this information, how could you have used it to support your defense of Mr. Smith on the Roman Street case?

A Well, I could use it to show that some people said there were four people, that there was a chaos going on and nobody really knew what happened, especially since we have witnesses that said that they had masks on their faces. And, obviously, since this guy has confessed, I would suggest that he would know who was in the car and who did the shooting, and he denies that it was Short Dog.

[33]

Q And, he places himself in the house as well as Donnell Banister.

BY MS. ANDRIEU:

Objection.

Leading, Your Honor.

BY MS. KELLY:

Q Is that correct?

A That's correct.

Q And, we know that Phillip Young was also in the house.

A That's correct.

Q So, you could have used this to support mistaken identification.

BY MS. ANDRIEU:

Objection.

BY THE WITNESS:

I certainly could have used it for impeachment in cross examination, yes.

BY MS. KELLY:

Okay.

Q Now, —

BY MS. ANDRIEU:

Your Honor, the State is asking for an admonishment to Mr. Juan's counsel not to either lead the witness nor testify for him.

BY THE COURT:

You are leading your witness.

I am going to stop you from now on. I am not going to let you do that.

When you formulate your question, if it is already giving the answer to what you want the witness to say, I am going to stop you and say that you can't do it.

BY MS. KELLY:

Okay, Your Honor.

BY THE COURT:

And, if you keep doing it, I am going to have to do something else.

BY MS. KELLY:

[34]

Okay.

Q Mr. Larre, did you ever interview Eric Rogers (spelled phonetically)?

A (No response)

Q About this case?

A I don't think so.

I don't remember.

BY THE COURT:

Now, who is Eric Rogers?

BY MS. KELLY:

Eric Rogers, and he was mentioned in the capital trial, was the person that first went to the police and stated that Robert Truckling had confessed to Morrison Road.

That was brought out at the capital trial.

What was not disclosed and turned over was that Eric Rogers also told the police before they talked to Robert Trackling that he confessed to the Roman Street crime.

BY THE COURT:

All right.

Go ahead, Mr. Larre.

You don't remember?

BY MR. LARRE:

I don't remember talking to him.

BY THE COURT:

But, you are not going to say that you didn't talk to him? You just don't remember, is that right?

BY MR. LARRE:

Well, I know I talked to Eric Rogers a lot because I was involved in his own murder trial representing one of the co-defendants.

BY THE COURT:

Okay.

BY MR. LARRE:

But, I don't remember him saying that Trackling confessed to him or [35] that he had given a statement to Mr. Ronquillo, Detective Ronquillo, in reference to this.

And, I know that these documents with these statements were never presented to me.

BY MS. KELLY:

Okay.

Thank you.

Q Now, Mr. Larre, could you now turn to exhibit one which is the D.A. File and go to page thirty-seven, fifty-one?

A All right.

On this page, on the bottom right hand corner it says, "D.A., zero, zero, three, seven, five, one, page forty-five of eighty, item number C-17, seven, one, ninety-five."

The highlighted part says that, "At 9:45 p.m. Ronquillo spoke to Michelle Branch (spelled phonetically) at telephone 596-6838. Branch advised Ronquillo that Phillip Young was her boyfriend and that he lived at 809 St. Mary Street, Apartment O with her and her children. Branch added that she was pregnant with Young's child. Branch then told Ronquillo she last saw Young on Wednesday, March first, 1995 about six p.m. when he left the house with her, 1976 — she wasn't sure of the year, Chrysler LaBaron, beige in color, mistaken for white at night with no license plate and having a bad noisy muffler. Branch added that the car was very loud due to the muffler. She said that everyone knew when you were coming with the car. Branch added that she knew many of Young's friends. Knew that he left alone. Branch said that an older man was putting a radio in her car when she looked out the window prior to Young taking the car. She could not identify the older black male. Branch then advised Ronquillo that she received a telephone call from an unknown caller on Friday, March, 1995, March the seventh, I think.

She stated that one Kintad Phillips (spelled phonetically) was driving her car and in the Calliope Housing Project, and then put a temporary license plate in the rear window having the numbers 3725895. Branch added that

[36] Phillips is known to be with a subject named Fats or Donnell Banister and has killed people before. Branch concluded the conversation by saying that she did not know Phillips to have a gun of any kind and never saw him with a gun."

Q Okay.

Did the State provide you with those statements in preparation for Mr. Smith's trial?

A No, ma'am.

Q Okay.

Now I would like you to go to page forty-three zero four.

A Okay.

Q Exhibit number one.

A That document that you have referred me to on the right hand corner says, "D.A. zero, zero, four, three —" Did you say a one or a four?

Q I'm sorry.

Four, three, zero, four.

A Zero, four.

It says, "D.A. zero, zero, four, three, zero, four. Item number C-17, ninety-five, Michelle E. (Written phonetically).

Q Okay.

And, can you start with where — Okay.

Can you start where it says, the question, "Okay."?

A "Okay. Let me ask you another question, Ms. Branch. You said you haven't seen your car since that night." "Correct." "Has anyone seen your car?" "I have had phone calls that people have seen it, someone driving around in it, which they say is the boys. But, I think that by everyone, they had it is a lot of rumors out here, that it was Kintesh (phonetically).

"Okay. So, you have heard a lot of rumors plus phone calls that Kintad, is that Kintad Phillips, who was driving your car?

"Yes."

"And, you know Mr. Phillips, Kintad Phillips and any of his friends as you say, the gang, do you know their names?"

[37]

Answer, "Meaning who?"

"Who with Kintad, or who would Kintad run with and say his gang?"

"Fats. Just Fats."

"Do you know Fats real name?"

"No."

Q Okay.

Were you provided with this statement from Michelle Branch by the State in preparation for Mr. Smith's trial?

A No.

I can say to you that I was not provided with any supplemental police report or anything

purporting to be Detective Ronquillo's handwritten notes.

Q Okay.

And, if you had been provided this information, how could you have used this to help your defense?

A Well, obviously, it would indicate that a perpetrator by the name of Kentell (written phonetically) Phillips is the one who had possession of the vehicle alleged to be the get-away car. And, that he maintained it for many days, and that nobody saw or mentioned either Short Dog or Juan Smith being involved in that car in any way? Just Fats and Kintad Phillips.

Q Okay.

Thank you.

And then, can you now go to page thirty-seven, forty-three, of petitioner's exhibit number one? And, identify, again, what it says on the top?

A This says, "New Orleans Department, Homicide Division, page thirty-five of eighty-three, item C-17, seventy-one, ninety-five." And, on the bottom right hand corner typed in, "D.A. zero, zero, three, seven, four, three." And, the highlighted parts starts, "Ronquillo received a telephone call from Captain Tom Militage (spelled phonetically) part of the Pascagoula, Mississippi Police Department, on March second, 1995, at ten P.M. Militage informed Ronquillo that informant had supplied them with information that three individuals staying at the Oak Villa Gardens Townhouses in [38]

Pascagoula, Mississippi were responsible for a murder in New Orleans that involved more than one person.

Militage added that he was sending two detectives to speak to the informant who was aware of where the subjects were staying. Militage then asked Ronquillo what he should do if they were located. Ronquillo advised Militage to have the subjects photographed and fingerprinted and identify the subjects."

Q Okay.

Were you provided this statement in preparation for Mr. Smith's trial?

A No.

Q Okay.

And, could you — if the State — Would this have been something that you could have used favorable to your defense?

A Well, when I am reading the next paragraph, it is that the people who were identified were Charles Rose, Jerry Michael, — Jerry and Michael Wright (all proper names are written phonetically), which were three totally different people and didn't involve my client at all, if they were, in fact, part of this murder.

Q Thank you.

And, had you had this information, would you have tried to have your investigator —

BY MS. ANDRIEU:

Objection, Your Honor.

Leading.

BY THE COURT:

I am going to permit it.

Go ahead, answer the question.

BY THE WITNESS:

I certainly would have had my investigator try to investigate this.

You know, most of the cases that I have tried, I never had the luxury of an investigator. When I had one, I would have used him.

* * * * *

[50]

A It is identified on the top of the page as page thirty of eighty-three, Item C-17, seventy-one.

"Detective Dwight Deal, Deal advised Ronquillo that he took a statement from young witness, Ivory Hill, the Third, residing at 2220 North Roman Street at 10:30 p.m. Deal advised that Hill was located on the scene and transported to Homicide Office by detectives. Deal said that Hill advised him that he went to 2230 North Roman Street about 8:30 p.m. to buy a twenty dollar amount of crack cocaine from a subject that he knew only as [51] Robert. Hill advised detectives that he observed a black male wearing a red jacket in front of the house and asked who Hill was looking for. Hill said that he was looking for Rebby (phonetically). Hill then added that the subject told him to go up the steps and knock on the door. Hill added that the

subject followed him to the stairs. Hill then told Deal that he knocked on the door twice and a black male peeped through some aluminum foil on the window of the door. Hill then said that the subject asked him who he was looking for, to which he replied, Rebby. Hill then said that a black male seated at the kitchen table said that he would handle it. That the guy at the door walked to the back of the house for about five minutes. Hill then said that the subject in the red jacket returned and said that Rebby was not home. Hill then said that he left the house and returned to 2220 North Roman Street. Hill then added that about twenty minutes later he heard gunshots but didn't outside to see what was happening.

Hill then advised Detective Deal that he had scored drugs from a subject known to him as Robert at Rebby's house in the past, but had only been living in the area for about a month but has been to Rebby's house to buy drugs during the last six to seven months.

Q Okay.

Can you continue to the next page?

Page thirty-seven, thirty-nine?

A Page thirty-one of eighty-three.

"Hill then told Deal that he observed three or four additional black males in addition to the subject who was standing in the street and the subject who opened the door, that the subjects were still sitting around the table and were casually talking. Hill then told Deal that none of the subjects were armed and didn't recognize

any of the subjects and didn't know any of them to be Robert. (phonetically)

Hill supplied Detective Deal with descriptions of the subject who opened the door and the subject who was standing in front of the residence.

The subject who was standing in front of the residence was described to be twenty-five years of age, five eleven, tall, a hundred and seventy-five to [52] eighty pounds with a moustache and short hair and wearing a red jacket and dark pants and a lighter complexion than the other subject, and a diamond earring in his ear.

The subject who opened the door was described as being about twenty-three years of age, five foot six to five seven, about a hundred and twenty-five pounds, wearing a black jacket and dark pants with a medium haircut and dark complected.

He advised Deal that he could possibly identify the subjects from photographs.

Ronquillo then —

Q You can stop there.

Oh, I'm sorry.

That goes on to another statement.

So, — That's the end of Hill.

Were you aware of this statement? Or were you provided this statement from the D.A. or the police?

A No, I never received any of the supplemental report at all.

Q Okay.

And, had you been provided this statement, how could you have used this to support your defense?

A Well, I would have tried to determine and subpoena this gentleman —

* * * * *

[57]

Q Just for the record, Mr. Larre, because I think it was inaccurately stated up at the bench.

Have you ever conceded that Mr. Smith was nicknamed and was referred to as Short Dog?

A No.

Q In fact, whose theory was it that — who ever stated that Mr. Smith was referred to as Short Dog to your knowledge?

A The police.

Q Thank you.

A I have never heard Juan Smith refer to himself as Short Dog or any of the other co-defendants or witnesses that were interviewed refer to him as Short Dog.

Q And, were you provided any rap sheets or police reports that ever [58] indicated a belief that Mr. Smith's alias was Short Dog?

A Not that I recall, no.

Q Thank you.

All right.

* * * * *

[59]

Q I am now going to show you, if you could go to D.A. file page thirty-seven, forty-five.

And, from the top, identifying what the document is.

A New Orleans Police Department Homicide Division, continuation sheet, page thirty-seven of eighty-three. Item number 17, seventy-one, C.

Q Okay.

Can you go down to the first blocked paragraph about midway through the page that starts with, "Ronquillo received"?

A "Ronquillo received a telephone call from Rebby Espadron (spelled phonetically) at ten p.m. in the homicide office. Espadron advised Ronquillo he had a telephone number on a subject Marty (phonetically) which was 949-9411 and that the subject identified only his Dukie. (Written phonetically) He went to the home of Netta Simmons, the mother of Robert Simmons about an hour before the shooting and asked for Robert Simmons. Espadron added that Dukie drives a white car and lives on North Derbigny Street. Espadron then said that Dukie has been asking around the neighborhood about the murder and added that she saw Dukie and Marty drive by the house on North Roman Street in a maroon car, which belongs to Dukie's mother and wife — and wave. Espadron councluded the statement by saying that the

word on the street was that possibly six people were involved and that two stayed outside the residence during the commission of the crime and that Marty and Dukie were involved.

Q Okay.

[60]

Can you go to the next page, thirty-seven, forty-seven?

A Which would be page thirty-nine of eighty-three, same document.

Q Right.

And, go down to where it starts, "At five p.m".

A "At five p.m. Ronquillo received a telephone call from Rebby Espadron identifying Marty vehicle as being a greenish blue Cutlass and saw him driving the vehicle alone in the car by the house on North Roman Street about three p.m. Espadron added that they drove by the house at a high rate of speed and turned on Marigny Street in a river direction.

Q Okay.

Were you ever given any of these interviews of Rebby Espadron at any point during the trial?

A No.

Q And, prior to the trial you did request any witness statements from state's witnesses who had exculpatory information, is that correct?

A I request all witnesses' statements, whether they were exculpatory or not. And, I requested especially exculpatory and my request was

made continuing and ordered by the Court to be continuing.

Q Okay.

And, if you had been provided this information, could you have used it to support your defense?

A Well obviously it indicates that there were multiple people identifying multiple defendants. But, as far as I can tell, only Larry Boatner identified Juan Smith.

Q Okay.

* * * * *

[63]

* * * * *

If you could go to page thirty-seven, fifty-four?

A Thirty-seven, fifty-four, which is page forty-six of eighty-three, item seventeen, seventy-one, paragraph three.

"Nelson advised Ronquillo that he was driving Marty's vehicle and they went to Mr. Kenny's house on Marigny Street. Nelson added that when he went to Mr. Kenny's door and knocked Kenny came to the door. Nelson added that Marty stayed in the car. Nelson describe the car as belonging to Marty and being a green Cutlass with primer marks.

Nelson then said that Kenny answered the door and then he heard beaucoup shots. Nelson then said the he went into — he went into shock. Nelson then said that Kenny shut the door and he saw Marty run into an alley by a double

house where the car was parked on the uptown side of Marigny Street near North Derbigny Street.

Then said that the — when the shooting stopped he and Marty left the area.

Nelson then added that he got our of the car by a — some sort of store that I can't read.

BY THE COURT:

At the intersection of Mandeville.

BY MR. LARRE:

"At the intersection of Mandeville Street and North Derbigny Street. And, Marty drove from the intersection. Nelson said that when Marty left he said that he was going to see what happened."

Q And, again, were you ever provided this statement by the police or the D.A.'s office?

A No.

* * * * *

[65]

BY MS. KELLY:

Q Now you testified earlier that your defense strategy in this case was one of innocence and mistaken identification by Mr. Boatner.

A Yes.

Q If you had had the evidence that you have now looked at, would that have changed how you had your defense strategy in this case?

A Absolutely.

It would have allowed me to research these things and probably call some of these people as a witness to rebut the fact that the only possible person that it could have been was Juan Smith.

The evidence is only circumstantial against Juan Smith with the exception of the statement of Mr. Boatner. That is the only direct evidence and there was very much information about Mr. Boatner that he had some mental problems, alcohol problems, and when you read his statement that wasn't given to me together with other witnesses who say they can't identify these people at all.

That would be exculpatory.

Q Okay.

And, on the same token for the capital case that occurred after this, this conviction was put in as an aggravating factor. Would it have changed what you were able to present in the penalty phase of the capital case?

BY MS. ANDRIEU:

And, Your Honor, we are going to object. The capital case is not in question.

This is a postconviction hearing on the North Roman case only.

BY THE COURT:

It affects the capital case in that it was used in the penalty phase.

Go ahead.

BY MR. LARRE:

Obviously, the capital case had aggravating circumstances because a child, I think three years old, was killed. Plus —

[66]

BY THE COURT:

You represented him in both cases, didn't you, Mr. Larre?

BY THE WITNESS:

Yes, sir.

And, a small child was killed plus more than one person was killed.

That would be the aggravating circumstances.

But, to heap onto that the fact that he already had been convicted of five first degree murders certainly made it almost impossible to find anything that would mitigate the fact that — if they believed that he did this crime, it would make it almost impossible to find anything mitigating that would stop them from giving him the death penalty, which they gave.

But, if these convictions were based on flimsy evidence that was hidden from me, then it certainly wouldn't have led to the death penalty.

I think that that was the most damaging thing that caused my client to get the death penalty.

BY MS. KELLY:

Q Was it also relevant to the death penalty determination who was the shooter in this case?

A Sure.

Always the shooter is more culpable in everybody's mind.

And, if — The allegations were in the death penalty case was that another person was caught throwing a weapon out of a car that was allegedly used in the murder — one of the murders. And then when ballistics were done, then that gun showed that that gun killed at least some of the people on Roman Street and some of the people on Morrison Road.

And, then testimony was given was the guy who had the gun, because Mr. Smith was not in the vehicle when that gun was discarded, had given them that gun. So, the logical and argument made by Mr. Jordan was that if Mr. Smith was the original owner of the gun and he gave it to the person that had the gun and threw it out the window, then obviously he was the [67] shooter in both cases because he had it in his possession allegedly at the times of the murders.

So, yeah, it was very devastating that they say that he was the owner of the gun which would make him the shooter in all eight victims.

Q Okay.

And, does any of that co-defendants receive the death penalty in the capital case?

A No.

Q And, was anyone else in this case ever charged or prosecuted?

A Not to my knowledge, no.

Q Okay.

BY MS. KELLY:

I don't have any more questions.

I'll tender the witness to the State.

* * * * *

[71]

* * * * *

BY MS. ANDRIEU:

May the State ask Mr. Larre what Charity Hospital records were turned over to him?

BY THE COURT:

Yes.

Yes.

BY THE WITNESS:

I don't know.

It is twelve years ago, and my original file was lost in Katrina.

But, I will say that some of the records, and I believe it was the [72] Charity Hospital records were not presented to me until the middle of the trial. Because trial went to many late hours in the night, and I had a very horrible argument with Mr. Jordan because he presented me some records at seven or eight o'clock one night for the first time in the middle of the trial instead of prior to the trial.

And, I am only testifying from memory. I think those were the Charity records that I got in the middle of the trial.

BY MS. ANDRIEU:

Q So, your testimony today is that you received the Charity Hospital medical records shortly before trial?

A No, that is not my testimony.

My testimony is that in the middle of the trial, not shortly before the trial, Mr. Jordan gave me some records. And, I am not trying to mislead you, but I believe some of them were Charity Hospital records. I don't remember.

Q But, —

A Perhaps the transcript will show what records were given to me in the middle of the trial.

Q Were any Charity Hospital records made available to you before the trial?

A None that I remember.

Q Okay

A They might have been.

Q All right.

BY MS. ANDRIEU:

Your Honor, the State is presenting to Mr. Smith's defense counsel a certified copy of the fourth circuit record in this case, record two thousand, KA, one, three, nine, two.

Specifically, I am showing Ms. Kelly, it isn't numbered but I am showing her the testimony taken during the motion hearing in the matter of the State versus Juan Smith on October the 27th, 1995 before the trial of this matter.

[73]

May I approach the witness?

BY THE COURT:

Yes.

BY MS. ANDRIEU:

All right.

Q Okay.

Mr. Larre, you are an attorney, so you know what I am showing you.

This record, tell me who this record reflects that you called as a witness at the motion hearing?

A It says that I called Jamie Mills.

I don't have a recollection.

Let's see.

Page —

BY MS. KELLY:

Objection, Your Honor.

I am going to say that the State objected to me asking Mr. Larre what was testified to.

BY THE COURT:

That is not applicable to what this is about.

She is asking him whether he called this person.

I want to know that.

BY MS. KELLY:

Right.

And, it —

BY THE COURT:

Your objection is overruled.

Go on.

Move on.

Mr. Larre, is there any evidence in there that you called this person as a witness?

BY THE WITNESS:

Yes, Your Honor.

[74]

I am reading it right now.

I am on page thirty-one of this transcript.

It says that I called her.

BY MS. ANDRIEU:

Q And, without testifying to hearsay, to the contents of what Ms. Hicks said, because we don't want you to do that, do you now — has your memory been refreshed in terms of your calling as your witness Janie Hicks?

A They are being refreshed, and if the Court would allow me to read the short transcript, it would probably help me.

BY THE COURT:

Sure.

*****

MR. LARRE READS THE TRANSCRIPT THAT WAS PROVIDED TO HIM.

*****

BY THE WITNESS:

Your Honor, I have read the entire testimony, and don't remember having any medical records from Charity Hospital. But, I do — my recollection is refreshed, if I am correct.

I knew about this witness because I was told that she was present for a photographic identification.

And, if you read the testimony, every time that I try to question anything that she knew about his medical condition or his treatment, it was objected to by Mr. Jordan.

And, the only thing that she was allowed to testify to was that she was there for a few minutes when he looked at pictures and pointed someone out.

BY MS. ANDRIEU:

Q And, Mr. Larre, my question to you is did you call Janie Mills as a witness before trial?

A I called her as a witness in the motion —

Q Can you answer my —

[75]

A Can I finish my answer?

According to what I read today, which has refreshed my recollection, I called her. She was a psychiatric technician. She was on the treatment team for Mr. Boatner. But, I didn't know that at the time.

Q Well, when you —

A What I knew was that she was there when pictures were shown.

And, every time that I asked her anything else, there was an objection and it was sustained.

Q Okay.

Mr. Larre, so you knew that Mr. Boatner was being treated at Charity Hospital?

A I knew right close to the hearing on the motion to suppress, yes.

Q Okay.

And, you somehow knew that Jamie Mills was one of the members of the treatment personnel?

A No, I didn't know that. All I knew was that she walked him down to the room where he looked at pictures.

Q Okay.

A She was not treating him.

Q Okay.

But, at the time that she testified —

A Then how would I know that she was on his treatment team, if she didn't treat him?

Q Or that she was somehow connected?

I am not going to testify as to what she did.

I understand that the defense is calling her.

But, you knew, and after the motion hearing you knew that Mr. Boatner was in Charity Hospital. You knew that he was being treated in Charity Hospital. Okay.

A I don't deny that.

Q Okay.

Actually, I'll take the record back in a little bit and I'll direct your [76] attention to another part of the motion hearing where the fact that Mr. Boatner was being treated in psychiatric unit was put on the record.

A I knew that.

Q All right.

You knew that.

All right.

Okay.

So, now my question is did you move this Court to subpoena Mr. Boatner's Charity Hospital records?

A I don't remember.

Probably.

I don't know.

I subpoenaed and questioned and asked to be turned over by the State of Louisiana every document that they had in reference to my client including medical records of the people who were going to testify — his medical records.

Q Okay.

And, how did you learn that Jamie Mills was present when Mr. Boatner identified Juan Smith's photograph in thelineup?

A I don't remember.

That is what I am telling you.

Q Okay.

I am going to show you whe you have already looked at.

I —

BY MS. KELLY:

Your Honor, I am going to object on the prosecutor being allowed to get into areas that you wouldn't let me get into.

So, because of that —

BY THE COURT:

No, it is not the same.

BY MS. KELLY:

No, it is the same because she is making it the insinuation that he [77] knew about these records because of Janie Mills.

Because you wouldn't let me have him look at them, the notes that are relevant here, was signed by a person completely different — a completely different person.

It wasn't Janie Mills.

BY MS. ANDRIEU:

Your Honor, in fairness, what we objected to was the nature of how the testimony was elicited.

Okay.

We have no objection to the testimony coming out but there are evidentiary rules and we were making an evidentiary rule objection.

Having said that, Mr. Larre has looked at —

BY THE COURT:

Well, the first thing, I am not sustaining your objection.

So, go on.

BY MS. ANDRIEU:

Mr. Larre has looked at the supplemental police report in this case.

Specifically, he has looked at on the bottom right where he has identified as D.A. zero, zero, three, seven, eight, six. Page seventy-nine of eighty-three pages under item number C, one, seven, seven, one, nine, five.

BY MS. KELLY:

Wait.

What is that?

BY MS. ANDRIEU:

I am going to direct his attention to —

BY MR. LARRE:

That would be page seventy-nine of eighty-three?

BY MS. ANDRIEU:

Yes, sir.

[78]

BY MS. KELLY:

All right.

Wait a minute.

This is — He testified to the supplemental police report that —, and there is nothing to state that he was never given a supplemental police report.

BY MS. ANDRIEU:

And, we are allowed to introduce evidence that he was provided with a supplemental police report.

BY THE COURT:

Go ahead.

BY MS. ANDRIEU:

Q So, now I am going to ask you to look again at the second to last paragraph and as Ms. Kelly had you read, I am going to ask you to read the second to lat paragraph of that report.

A "It should be noted that psychiatric —"

Q You don't need to read it aloud, but I would like for you to read it.

Do you see the name, Janie Mills?

A Sure.

Q Okay.

Or, Jane Mills.

I'm sorry.

Is it your testimony today that you did not have this police report before trial, in fact before motion hearings?

A Yes.

Q How did you know that Jamie Mills was present when Mr. Boatner identified Juan Smith if you didn't have this?

A I don't know.

It may have been in the original report.

BY MS. KELLY:

Your Honor, again I am going to object.

BY THE COURT:

[79]

Wait.

Let him finish.

BY THE WITNESS:

I think that you are being very unfair in your questioning.

The fact of how did I know, what I am telling you is I never saw it from this set of documents. Because I never got this set of documents before the trial.

That doesn't mean that in my preliminary exam, in my questioning of the police, in my questioning of the return on any documents that I am almost positive that — that — that Mr. Ronquillo — Officer Ronquillo said this person was present when the photographic lineup was done.

But, that doesn't mean or that doesn't negate the fact that I got it from a supplemental report. I didn't get it from a supplemental report.

And, I didn't testify from the page that you just showed me.

I only testified today was from ones with blue markings that she asked me to read.

Now, where I got Miss Mills' name, I don't know.

But, if you want to put the whole transcript of the testimony I was able to elicit from Ms. Mills, was that she —

BY MS. ANDRIEU:

Actually, I am not asking for the substance of her testimony.

Q I am more interested in the fact —

Well, it should be.

BY MS. KELLY:

I —

BY THE COURT:

Wait, wait, wait.

BY THE WITNESS:

I'm sorry.

BY MS. ANDRIEU:

[80]

And, Ms. Mills will be here tomorrow as I understand it.

I am actually interested in knowing how you were able to get the name Janie Mills if you had no information concerning Charity Hospital records.

BY THE COURT:

Do you recall how you got the name Jamie Mills?

BY THE WITNESS:

Okay.

Number one, what you are saying is that I am testifying that I had no — not been given any Charity Hospital records.

That is not what I am testifying to.

I testified that I had not gotten Charity Hospital records in a supplemental report.

They may have come in the regular report.

I don't remember.

Somewhere along the line, I had Janie Mills' name because I evidentially either in my written discovery or in my discussions with Mr. Jordan, or by questioning Mr. Ronquillo in his testimony who was present at the time.

That doesn't mean that I had the Charity Hospital records or anyting in them.

I did not — I may have.

All I am telling you is that I was questioned today whether I got a supplemental police report, which is exhibit number two, which I did not. Or, that I — I'm sorry. That I got supplemental report which is exhibit number one, or did I get a copy of policeman Ronquillo's notes, which would be called dailies.

I never to a copy of dailies. I never got a supplemental report.

Now, if they had Ms. Mills' name in something else I got, that's where I got it from. But, I didn't get it prior to the trial from either one of these reports.

[81]

BY THE COURT:

Okay.

You did not get it from the supplemental report.

You don't remember getting the supplemental report, is that right?

BY THE WITNESS:

Did not get a supplemental report.

BY THE COURT:

All right.

So, —

BY MS. KELLY:

Your Honor, I do want to object on the best evidence.

BY THE COURT:

Wait one second, ma'am.

So, you don't know how you came up with the name of Ms. Mills?

BY THE WITNESS:

No.

BY THE COURT:

Is that right?

You can't recall?

BY THE WITNESS:

No.

And, an obvious reading of this four page or five page transcript, I didn't know very much about Ms. Mills.

BY THE COURT:

Okay.

BY MS. ANDRIEU:

And, Your Honor, at this time the State is going to —

BY MS. KELLY:

I would like to object on the best evidence rule.

There were Brady requests according to Mr. Larre that were filed.

If the State turned over something in to Brady, can you produce to Mr. Larre an answer showing that he was turned over witness state- [82] ments or supplemental?

It should be part of the record.

BY MS. ANDRIEU:

And, Your Honor, —

BY MS. KELLY:

And, we have not been provided —

BY THE COURT:

Wait, wait, wait, ma'am.

You have got to let her answer you.

Go ahead.

BY MS. ANDRIEU:

First, to clear — Before moving on to that issue, just to clear up Mr. Larre's testimony. He suggested earlier — or

Q Did you suggest earlier that you may have learned of Janie Mills' name in the original police report?

A As honest as I can be, I have no idea where I got Janie Mills' name from.

BY THE COURT:

He is speculating.

He doesn't know where he got the name from.

That's it.

BY MS. ANDRIEU:

But, Your Honor, the original report is in the file and if we had a stipulation that Janie Mills' name is nowhere on the original report, that would be fine.

If not, we are gong to ask Mr. Larre to review the original report and see if —

BY THE COURT:

Is there a stipulation that in the original report Ms. Janie Mills' name is not mentioned?

BY MS. KELLY:

I would like to look at it.

[83]

BY THE COURT:

Okay.

Rather than having Mr. Larre have to red the report.

BY MS. KELLY:

Well, what I am looking for, I am not going to stipulate unless you have something that is showing that he was given this.

You know, there is nothing here that shows that this was turned over or that I have this attached to a Brady response.

BY MS. ANDRIEU:

Q Mr. Larre, were you provided a copy of the original police report?

A Yes.

BY MS. KELLY:

Okay.

Then I can look through this quickly to see if it is mentioned.

BY THE COURT:

All right.

* * *

MS. KELLY REVIEWS THE EXHIBIT.

* * *

BY MS. KELLY:

Yeah, I'll stipulate to that.

BY MS. ANDRIEU:

Okay.

BY THE COURT:

So stipulated for the record.

In the original police report, the name of Jamie Mills was not mentioned, correct?

And, also it is the testimony of Mr. Larre that he received the Initial report, is that correct, Mr. Larre?

BY THE WITNESS:

Yes.

BY THE COURT:

[84]

All right.

BY MS. ANDRIEU:

At this time, Your Honor, the State would like to direct this Court's attention and Mr. Larre's attention to the docket master in this case.

Specifically the docket master entry of November the 9th, 1995, which the State has highlighted in its copy of the docket master.

BY THE COURT:

Well, let me say this about the docket master.

I don't know what you are going to present —

BY MS. KELLY:

I'm sorry, Your Honor, no —

BY THE COURT:

Ma'am, let me finish.

BY MS. KELLY:

Okay.

BY THE COURT:

When I am talking, I would appreciate it if you don't talk.

If you are going to look at the docket master, my experience with the docket masters is that they are not always right.

I would rather if you could introduce something if something took place to deal directly from the minute entry and not the docket master.

The docket master is manufactured by the clerk's office. The minute entry comes from the minutes of the clerk in the court as the action takes place.

BY MS. KELLY:

Okay.

And, Your Honor, the only one thing that I wanted to say is this appears to be a minute entry for the capital case.

BY THE COURT:

It is the docket master. It is not a minute entry.

[85]

BY MS. KELLY:

Oh, I'm sorry, docket master, for the capital case, because it is referring to the co-defendant, Trackling, who were not co-defendants in this case.

And, Mr. Boatner's Charity Records were not part of the capital trail as he wasn't a witness in the capital trial.

BY MS. ANDRIEU:

Can I approach the witness, Your Honor?

BY THE COURT:

Yes.

BY MS. ANDRIEU:

Q Understanding that the weight of this evidence is not as strong as the minute entry, I am still going to direct Mr. Larre's attention to the November 9th, 1995 docket master entry.

A I have no idea.

This says — I'll read it out loud.

"As to all defendants, status hearing is complete. State filed incident supplemental report —"

BY THE COURT:

I am not understanding you, Mr. Larre.

BY MR. LARRE:

"Court appointed Mr. Ellois to represent the defendant Trackling." It doesn't say what evidence or memos were done. There might have been two or three supplemental reports.

This doesn't tell me anything.

BY MS. ANDRIEU:

Q Well, does it at all refresh your memory in terms of your having received any supplemental reports?

A I can tell you this. That this supplemental document is two hundred pages, if it is a page.

Q And, when you are saying "this", you are referring to?

A Petitioner's exhibit one.

[86]

Q Okay.

Which is the Charity Hospital records?

A No.

It is two or three pages of Charity Hospital records. That's all.

Q Okay.

A And, the rest is documents that were part of the supplemental report completed by Detective Ronquillo, starting at what was given to me right here at two thousand and fifty-three and goes to forty-three, eighteen. So, that is two hundred pages.

I can tell you, even though I lost my file in the flood, I never had a package of documents that was two hundred pages thick.

Now, I have — while we have been talking, read the transcript that you handed me, and I can now tell you how I found Ms. Mills' name.

BY THE COURT:

Okay.

BY THE WITNESS:

In here, Detective Ronquillo was asked on direct examination by Mr. Roger Jordan —

BY MS. ANDRIEU:

And, may I —

BY THE COURT:

Wait a minute.

Let him finish.

Let him finish.

BY THE WITNESS:

Well, you asked me how I found —

BY THE COURT:

Wait.

Don't stop a person when they are talking.

Go ahead, Mr. Larre.

BY THE WITNESS:

In here Mr. Jordan asked Officer Ronquillo who was present when [87] the pictures were looked at. He said, "His psychiatric assistant"

And then either Mr. Jordan or I said, "Who is that?" And, he said, "Jamie Mills".

And, if you go to look onto my cross examination of the Detective, Ronquillo, I didn't know who Jamie Mills was because I was asking what did he have to say, and I was told that it was a female.

BY MS. ANDRIEU:

Okay.

Q Now, —

BY THE WITNESS:

And, that's the evidence that you just gave me.

And, that refreshes my — well, it doesn't refresh my memory. I don't remember it, but that is the assumption that has to be made that when it was said in the motion to suppress and then the next witness I call is Ms. Mills, my witness that I called, because she was there.

And, you know, we had only like five pages of questioning, because it kept being objected to by Mr. Jordan, who refused to allow me to get into any pertinent parts of what Mr. Boatman's treatment was. Why was he getting psychiatric treatment? Did he have any head injuries? And, I was constantly told that it wasn't relevant.

BY MS. ANDRIEU:

Q And, Mr. Larre, you are reading from the trial motion hearing of —

A I am reading from the — You gave me a portion of the motion hearing, and I read back to the beginning of the hearing where it started and first witness called was Detective Ronquillo, and in his testimony he said, "I went there with pictures to show Mr. Boatner." Ad he was asked who was present, and it says, "His assistant, psychiatric assistant." And, that person is Jamie Mills.

Q And, Detective Ronquillo testified that iw as on the same day that you [88] called Jamie Mills, right?

A Yes.

Q And, did the State call Jamie Mills?

A No, I did.

Q So, it was your witness —

A Because the State didn't. They were satisfied to just put Detective Ronquillo on to say that the thing was totally according to Hoyle.

BY THE COURT:

If you recall, if they testified on the same day, was there a subpoena issued for Ms. Mills during the course of the motions or was she present and just called?

BY THE WITNESS:

I think she was present and just called.

BY THE COURT:

So, she was here.

BY THE WITNESS:

Yes.

BY THE COURT:

Was there a subpoena ever issued to Ms. Mills by the State or the Defense?

BY MS. ANDRIEU:

Your Honor, I think that Ms. Mills will testify tomorrow.

And, I think that she might be the best person to answer that.

I can tell you what she has told me, because I —

BY THE COURT:

No.

I will listen to her.

BY MS. ANDRIEU:

I think that she will be in that chair tomorrow.

BY THE COURT:

Okay.

BY THE WITNESS:

[89]

But, I didn't know this before that testimony.

BY THE COURT:

So, from your recollection, was that the first time that you had identified that there was a person named Jamie Mills who witnessed the lineup?

BY THE WITNESS:

Yes.

BY THE COURT:

Okay.

BY MS. ANDRIEU:

Q Mr. Larre, during your representation of Juan Smith, did he ever refer to himself as Short Dog?

A Not that I can remember, no.

Mr. Juan Smith was always very formal with me. He called me Mr. Larre, and I called him Juan.

Q Okay.

BY MS. ANDRIEU:

Your Honor, the State tenders the witness.

BY THE COURT:

All right.

* * * * *

[93]

BY MS. ANDRIEU:

Q Knowing that Mr. Boatner suffered from acute alcohol abuse, as you apparently did, since you called your witness at trial, would you have subpoenaed Mr. Boatner's Charity Hospital records?

A My recollection is that I tried to do that, and I got partial records. Yeah, one of the things that nobody is asking me and you should realize that

this murder happened March the first of '95. By the time he got indicted and all, I don't think it was until about June. And, I tried this case by myself with one part-time investigator and it went to trial in October of '95.

You know, traditionally, murder cases in this building sometimes don't go to trial for a year and a half to two years. This was a very, very quick trial, and it probably went to trial no later than the second setting.

So, I can only tell you that I used what I had with the limited resources that I had. And, if I had had a medical document that said this client stated to his medical professional that the police were harassing him, I would have been calling somebody and subpoenaing somebody. I never had that part of the record.

And, I never found out, the more I think about it, about Ms. Mills [94] (spelled phonetically) until the morning of the motion to suppress when I didn't even — I thought that he was in the hospital because he was injured in the shooting accident. I didn't find out about any alcohol or any psychological problems until the morning of the motion to suppress when they said his psychiatric assistant took him down. And, every time I tried to delve into that it was objected to as being irrelevant and sustained.

Q And, after learning what you learned during the motion hearing, did you then file a motion to subpoena Mr. Boatner's Charity Hospital records?

A And, I am going to answer the same way that I have answered every time you have asked that question, I don't remember. I don't remember. But, the records are very easy to find out what I subpoenaed. I may have made a mistake and not subpoenaed them, or maybe I assumed that what they gave me was all they had.

Or, maybe I did subpoena them and that's all they gave me. I just don't know the answer.

* * * * *

[97]

BY MS. ANDRIEU:

Q And, that is, Mr. Larre, if you felt as though you were not adequately prepared to proceed to trial, would you have filed a motion to continue?

A That's not what I said at all.

I said that it was a short period of time. I did the best that I could, and I went to trial with what I had.

But, I can tell you that I am not an incompetent lawyer, and if I would have had a document that said this man was alleging to his medical doctor that the police were harassing him, I would have used it.

Why I don't have it, I don't know the answer to that.

But, it is here and it is available, and if I would have had it, I would have used it.

BY THE COURT:

Well, his answer is not what you are asking him.

What you asked him was —

BY MS. ANDRIEU:

Yes, Your Honor.

It is not responsive to my question.

BY THE COURT:

[98]

But, he is saying here that the issue here is whether or not — it was not a question of continuance here, he is saying if he didn't know about it, he certainly wouldn't have asked for a continuance.

BY THE WITNESS:

I can tell you this.

The only thing that I know absolutely certain in my mind is if I would have seen a document that said this man, this witness, who is the only witness who identifies my client said that the police were harassing him to make a slipshod identification that I would have beat down the walls trying to find that person.

I didn't know it.

* * * * *

TESTIMONY OF DALE MIMS

[102]

* * * * *

Now, I want to bring you back to the events of March the first of 1995.

Okay.

Where — Were you home at or around seven o'clock, between six and seven o'clock on March the first of 1995?

A Yes, I was.

Q Okay.

And, at that time did you see or hear anything that brought your attention to your front door?

A Yeah, there was a whole lot of gunshots.

Q Okay.

And, can you tell the Court, tell the Judge, when you heard those gunshots, what, if anything, you did?

A Well, everybody run for some cover. And, there was chaos. (written phonetically)

Q So, when you heard the shots, what did you do?

A Look for some cover.

Q Some cover.

And, where were you when you heard the shots?

A At home.

Q And, at home, you were inside your home or outside?

A Inside my house then.

Q Okay.

At any time did you — After you heard the shots and took cover, at any time did you come out from having taken cover?

[103]

A Yeah, after a while, when the gunshots went to a lull, I opened the front door.

Q And, when you opened the front door, did you see anything?

A No.

Q When you opened the front door, did you see anything up the street?

A Oh, I'm sorry, yeah. I saw two guys with a stocking mask and I saw two AKA's, one on one side and one on the other side, and a car.

Q Okay.

A I heard a twelve gauge shotgun going off in the background.

Q Okay.

And, when — And, were you able to identify the two people that you saw at the car?

A No.

Q Okay.

Did you see the two people at the car coming out of the house?

A No. All I saw was when they were going for the car.

Q So, you saw them —

A I saw them — I saw one on either side pointing an AKA and I heard the twelve gauge going off in the background.

Q Okay.

And so, just for clarity, you say that you saw them at the car?

A Yeah.

Q Okay.

And, can you describe the car that you saw?

A I think it was a white car. It looked like a four door.

Q I'm sorry?

A A four door white car.

Q Okay.

A It passed my residence and went off.

Q Okay.

BY THE COURT:

Was this gentleman a witness in the trial?

[104]

BY MS. ANDRIEU:

No, Your Honor, he wasn't.

BY THE COURT:

So, why —

BY MS. ANDRIEU:

Q At any time —

I'm sorry?

BY THE COURT:

So, why is this testimony needed in this case?

BY MS. ANDRIEU:

His —

BY THE COURT:

What is this?

Let's see the petition for postconviction relief.

BY MS. KELLY:

Yes.

Your Honor, I also wanted to give you a copy of this statement that we had asked Mr. Larre about that wasn't turned over about the police interview.

BY THE COURT:

All right.

But, look let's handle one matter at a time.

Just give me that.

* * *

THE COURT REVIEWS THE PETITION PROVIDED TO HIM.

* * *

BY THE COURT:

Okay.

Let me ask you this question. What is the purpose of this man testifying at the postconviction relief hearing?

BY MS. ANDRIEU:

[105]

Your Honor, the petitioner has alleged that Mr. Mims was interviewed by Detective Ronquillo on

March the sixth, five days after the event. And, that the substance of his testimony is that he saw two masked people. You know, without making the petitioner's argument, I —

BY THE COURT:

Okay.

Go ahead.

Go ahead.

Continue on.

BY MS. ANDRIEU:

Without making their argument, I believe that —

BY THE COURT:

Continue on.

Go ahead and ask him your questions.

BY MS. ANDRIEU:

Thank you.

Q Mr. Mims, did you see the car when it arrived?

A No, ah ah.

Q Okay.

Did you see any individuals from that car when the — after the car arrived?

A No.

Q Okay.

Did you see anyone in the house off of the street?

A No.

Q Did you see them coming out of the house?

A No.

Q Where my house is sitting and where that house sits, you know, unless it was on Roman (spelled phonetically) Street, but I think that was on Marigny (written phonetically).

Q Okay.

[106]

BY MS. ANDRIEU:

Your Honor, may I approach the witness?

BY THE COURT:

Yes.

BY MS. ANDRIEU:

Q Mr. Mims, I am going to show you a photograph which I have marked as State's Exhibit B, for purposes of this hearing.

Do you recognize anything in this photograph?

A Yes. This is my house there, and this is the other house.

Q And, this is the house where there was the murder?

A Yeah.

Q Okay.

I am going to just for record purposes put an "X" over that house.

Okay.

And, so — Can you show me where on the photograph the car —

A I'm sorry.

I'm saying it should be back in there.

Q Okay.

Can you show me where the car was parked?

A It looked like it was over there.

Q Okay.

I am going to put —

A On that street there.

Q Okay.

I am going to put a star where you are pointing to, okay?

Just so that the Judge can understand your testimony.

Okay?

A Uh huh.

BY MS. ANDRIEU:

Your Honor, the State tenders the witness.

BY THE COURT:

Tendered.

[107]

* * *

CROSS EXAMINATION

* * *

BY MS. KELLY:

Your Honor, I also wanted to give you — I gave you Defense Exhibit One, but I was going to give you

Petitioner's Exhibit Two, so you could see the interview that we are referencing.

BY THE COURT:

All right.

Continue with the cross examination.

BY MS. KELLY:

Okay.

Q Mr. Mims, was it your direct — I believe that you said on direct that you thought that you heard the guns going off at around seven, is that correct?

A (No response.)

Q Or, do you remember what time you heard the shots at this point? Do you have a memory of that?

A Not the exact time, no.

Q Okay.

So, if at the trial that everyone testified that it occurred at eight thirty, is it possible that it was eight thirty that evening?

A Well, I just know that I heard shots and I was trying to find some cover.

Q Okay.

A I was trying to find some cover.

Q Okay.

A It was like a war zone.

Q You — Did you see the police that arrived that evening after the shooting?

A Yeah, the police came and everything. It was fenced off. Yeah.

Q And, do you know, do you remember how long after the shooting [108] before the police arrived?

A No, not really, but I know it wasn't that long.

Q Okay.

So, if the police arrived and were called out some time after eight thirty, would you think that was closer to the time it occurred?

A I have no idea when.

Q And, Mr. Mims, do you remember being interviewed by a Detective Ronquillo five days, approximately five days after the shootings about anything that occurred?

A No.

Q Do you mean you don't remember or that you weren't interviewed?

BY THE COURT:

Well, you asked him the question, and he said no.

BY MR. KELLY:

Okay.

You don't remember being interviewed.

Okay.

Q I want to show you what has been entered as Petitioners' Exhibit Two, which are notes that were taken by a detective Ronquillo who was

investigating the case. And, I would like to show you —

BY THE COURT:

Whoa.

Wait a minute.

He said no.

These are the notes of Ronquillo, and —

BY MS. KELLY:

Right.

Well, it is to refresh the witness' memory, I was going to show him —

BY THE COURT:

Refresh him with notes that Detective Ronquillo wrote down?

BY MS. KELLY:

Yes.

[109]

BY THE COURT:

No.

BY MS. KELLY:

Well, I just want him to look at the —

BY THE COURT:

No.

If you have something that he wrote, yes.

But, the answer is no.

BY MS. KELLY:

Okay.

Q Then let me ask Mr. Mims, do you recall, do you remember that you were never interviewed by a police officer, or do you remember at all?

BY THE COURT:

I think he has answered the question.

BY MS. KELLY:

I am not clear on that. I am trying to clarify if he is saying that he doesn't remember it or he remembers it.

BY THE COURT:

He said no as to Ronquillo.

Are you asking if any other police officer interviewed him? You can ask that question.

BY MS. KELLY:

Okay.

What I am trying to establish is the distinction —

BY THE COURT:

Ask him the question.

Don't explain it to me.

BY MS. KELLY:

Okay.

Q Do you recall any police officers interviewing you about what you heard?

A What I just answered, no.

[110]

Q Okay.

And, on your direct testimony you said that you saw two men, at least — you saw two men after they were in a white car after the shooting? Is that what you testified to?

A What I said is I saw two guys going to a white car and they had two AKA's and two in the car and I heard a twelve gauge pump going off in the background. And, that stuck with me all — That's what I remember.

Q And, if a police office wrote down that they talked to you and that you said —

BY MS. ANDRIEU:

Objection, Your Honor.

BY THE COURT:

Well, wait a minute. Wait a minute now.

I just told you — You can ask the question many ways. He said no, and you want to talk to him and refer to those notes, and that is a no also.

BY MS. KELLY:

Q Well, Your Honor —

BY THE COURT:

Well, no is no.

BY MS. KELLY:

If you could let me respond.

When I —

BY THE COURT.

No, ma'am.

If you are going to respond, you are going to respond outside the hearing of the witness.

If you want to do that —

BY MS. KELLY:

Yes, if we could approach the bench?

BY THE COURT:

Step up here for a minute.

[111]

* * *

A CONFERENCE IS HELD AT THE BENCH, OFF OF THE RECORD, WITH ALL COUNSELORS PRESENT.

* * *

BY THE COURT:

Finish it up.

BY MS. KELLY:

All right.

Okay.

Q Mr. Mims, how sure are you — You saw two men. How sure are you how many people you saw outside?

A I'm positive of that.

Q You believe it was two men?

A Yeah.

And when they passed my house, it was three.

Q When they what?

A When they passed my house, there was three.

Q There were three?

A Yes.

Like I said, the AKA's stopped shooting. I saw the two guys, one on either side with the guns get in the car. Then I heard the twelve gauge going off in the background.

BY THE COURT:

So, what you are saying is that when you saw them get into the car that there was still gunfire going off in the background?

BY THE WITNESS:

The twelve gauge shotgun was going off.

BY THE COURT:

Okay.

BY THE WITNESS:

I remember that.

And, when the car passed me —

[112]

BY THE COURT:

So, if I understand your testimony, you said that you saw two people put AKA 47's in the back of a car?

BY THE WITNESS:

They were putting them in the car.

BY THE COURT:

They put them into the car.

And they got into the car?

Is that right?

BY THE WITNESS:

Yeah.

BY THE COURT:

And, you said that there was a third subject that cross in front of your house?

BY THE WITNESS:

I could hear the pump going off, but I didn't stand and —

BY THE COURT:

And, you heard a shotgun, what you interpreted as being a shotgun?

BY THE WITNESS:

The pump.

BY THE COURT:

Okay.

BY MS. KELLY:

Q Okay.

And, the third, did you see them?

A No.

Q Even when they got in the car?

A No. When they passed, when the car passed my house, they didn't speed. They drove.

Q Could you tell if the third person had a mask on?

A The three people?

BY THE COURT:

[113]

If I am taking it that you saw two people get in a car, but there were three people —

BY THE WITNESS:

When the car passed.

BY THE COURT:

Okay.

BY MS. KELLY:

Okay.

Q And, two of the people, you know, had masks on?

A Yes.

Q And, the third person, do you know if they had a mask on or not?

A I don't think when they passed my house, none of them had a mask on.

Q Okay.

A Because they took their masks off and put it in the car.

Q Okay.

And, did you know the people that lived at the home where the shootings occurred?

A I remember Reba.

Q Okay.

Did you know Larry Boatner?

A No.

Q Okay.

And, so, the man — You wouldn't have recognized if it was Mr. Boatner that ran out with the shotgun?

A I don't know.

Q And, the car, other than — How soon after you heard the shots, did you see these men? Do you know? In minutes? Or, do you have any idea?

A No, a matter of seconds. It wasn't long from when the pump stopped shooting, then I saw them coming.

Q And, did you hear the car at all when it drove off?

A No.

Q All right.

* * * * *

[115]

* * * * *

Q Okay. And, the third person that you mentioned, did you ever see that person masked?

A No.

* * * * *

TESTIMONY OF BARBARA RILEY

* * * * *

[116]

BY THE COURT:

All right.

State your name for the record, ma'am.

BY THE WITNESS:

Barbara Riley.

BY THE COURT:

All right.

Ms. Riley, would you take the witness stand?

BY MS. STANLEY:

For the record, Your Honor, I am Kristen Stanley on behalf of Petitioner Juan Smith.

BY THE COURT:

Okay.

BY MS. STANLEY:

Q Good afternoon, Ms. Riley.

[117]

A Good afternoon.

Q Can you tell us what your occupation is?

A I am a retired RN.

Q Okay.

And, where were you employed in 1995?

At Rehab Institute of New Orleans.

Q And, what was your title at this institution?

A I was like a head nurse or nurse manager of the Brain Injury and Stroke Unit.

Q And, can you tell us very briefly what your job entailed?

A It was supervising patient care, attending staffings, weekly staffings on each patient, making rounds with the doctors, doing the actual staffing making sure that the, you know, that there was enough help on the unit.

Q Okay.

Thank you.

Do you remember a patient on your unit by the name of Philip Young?

A Yes, I do.

Q Can you tell us how long he was a patient on the unit?

A I would have to have the record in front of me.

It probably was several weeks because he came to us, as I remember, he came to us from acute care and for therapy. And, the usual length of stay was about thirty days.

Q Okay.

Do you recall what his injuries were?

A No, I do not remember.

Q Okay.

Can you describe his condition? For example, what was he capable of doing or not doing?

A I know that he did not speak.

Q Okay.

A He did not talk to us.

Q Okay.

[118]

A He was pretty much bed ridden, as I remember it. This is a long time ago.

Q I know.

I understand.

A Okay.

Q Just to the best of your recollection.

Did you ever have any contact with law enforcement regarding Philip Young?

A With who?

Q Law enforcement? Police?

A There was a detective that came to the unit and he did ask me to go in while he questioned the patient, which I did.

Q And, can you describe for us what the questioning was like?

A I can't remember specific questions that he asked. I can only remember that he was very non-threatening with the patient. He was really rather gentle with him. He didn't try to force any answers. Of course, Philip was not talking to us, but as I recall he did I think would nod a couple of times, but that was about it.

Q And, were you present for the entire length of the questioning?

A Yes.

Q And, were you present when the Detective administered the Miranda Rights to Philip Young?

A Yes, he did.

When he first entered the room.

Q And, was Philip Young able to respond that he understood?

A He could not — He was not verbally responding, but like I said he did nod a couple of times. But, most of the time when the detective asked him a question he kind of would just look away.

Q But, just for clarity, he was able to either nod his head to respond yes or shake his head to respond no?

A Yes. Yes.

Q Do you remember how long the questioning took place?

[119]

About?

A Ten or fifteen minutes. No longer than that.

Q Okay.

And, you said that you didn't recall the subject matter of the questions.

Do you remember if it was about the North Roman Street incident?

A I really don't remember.

Q Okay.

What contact did you have with the detective after the questioning, if any?

A What?

Q What kind of communications did you have with the detective after the questioning was all finished?

A We may have had one phone conversation.

I think he called me one time and asked me if there was any change in Philip's condition, which I hadn't seen any myself, so I told him no.

Q But, as far as you know — As far as you saw, he didn't return and you were present for any other questioning or anything?

A No.

BY MS. STANLEY:

Just a moment, Your Honor.

Q In your care of Mr. Young, in your daily activities with him, how was he able to communicate with you? Was he — for example, did he — You testified that he was able to shake his head or nod yes or no when questioned.

Was that how you were able to communicate with him?

A I didn't do any hands on care with the patients. I was just in a supervisory capacity. So, I am not really sure how he communicated with the nurses, you know, on the floor.

I would make rounds every day with all of the patients, and I would say, you know, "Good Morning, Philip. How are you today?" And, he would, you know, just look at me. I never got a verbal response from him.

Q But, you were able to communicate with him, at least in the sense that he could shake his head yes or no?

[120]

A Yes, yes.

Q Okay.

BY MS. STANLEY:

I have no further questions.

BY THE COURT:

Any questions by you, Ms. Andrieu?

BY MS. ANDRIEU:

Yes, Your Honor, just a few.

* * *

CROSS EXAMINATION

* * *

BY MS. ANDRIEU:

Q Ms. Riley, as — in the course and scope of your employment, did you have access to Mr. Young's medical records?

A Yes.

Q And, do you remember anything about his condition, his physical condition?

A Only that he had lack of speech. He was aphasic.

Q Do you have any recollection of his cognitive abilities?

A He appeared to understand what you were saying to him.

Q When he was administered Miranda Rights, is it your — Did it appear to you that he understood what was being administered to him?

A I believe the detective asked him, "Do you understand?" And, he nodded yes.

Q Were you aware of any diagnoses of Mr. Young?

A Any what?

Q Diagnosis? What was his diagnosis, the doctor's diagnosis for him?

A I'd have to see the medical record.

It is too far back right now.

Q Okay.

I understand.

Do you recollect amnesia?

[121]

A No, I recollect aphasia, a lack of speech.

Q Okay.

Okay.

BY MS. ANDRIEU:

Your Honor, the State tenders the witness.

BY THE COURT:

Tendered back to the Defense.

BY MS. STANLEY:

We tender as well.

BY THE COURT:

Any other questions of this witness?

BY MS. STANLEY:

No further questions.

BY THE COURT:

All right.

Ma'am, you can step down.

You are excused from your subpoena, ma'am.

* * * * *

TESTIMONY OF ERIC ROGERS

[121]

BY MS. STANLEY:

The petitioner calls Eric Rogers.

BY THE COURT:

Eric Rogers.

* * *

ERIC ROGERS, called as a witness by the Defense, after being duly sworn by the Court, testified as follows:

* * *

DIRECT EXAMINATION

* * *

[122]

BY THE COURT:

Would you take the witness stand, Mr. Rogers?

BY THE WITNESS:

Yes.

BY THE COURT:

Mr. Rogers, you are incarcerated. What are you incarcerated for, sir?

BY THE WITNESS:

For second degree murder.

BY THE COURT:

Second degree murder.

Okay.

And, you have already been sentenced in that case?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

You are sentenced.

And, where are you housed at?

BY THE WITNESS:

Angola.

BY THE COURT:

Angola, Louisiana?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

Okay.

Just push up your chair to the mike.

BY THE WITNESS:

Okay.

BY THE COURT:

Okay.

Let's proceed.

BY MS. STANLEY:

[123]

Q Mr. Rogers, were you ever interviewed by the New Orleans Police Department about your knowledge of the Roman Street murders?

A Yes, ma'am.

Q Do you know why you were interviewed by the police about that?

A Yes, I talked to my investigator, Sara Ring (written phonetically).

Because I was on C-4 (written phonetically) in the parish and an inmate came on the tier, Trackling. And, he had mentioned murder.

BY THE COURT:

You were on C-4 and Trackling, you said?

BY THE WITNESS:

Yes.

BY THE COURT:

Okay.

Go ahead.

BY THE WITNESS:

And, he mentioned about murder. And, one of the names that came out was a guy that — that I was angry with — that right now is spending a life sentence for right now. So, I called my investigator because I feeled (sic) like, you know, I was in jail so he gonna spend his time with me. So, I called my investigator and my investigator called a detective by the name of Byron Adams. And, they came and took me to the homicide office.

BY MS. STANLEY:

Okay.

Q So, you mentioned that you were on C-4 with Robert Trackling?

A Yes.

Q Is that correct?

A Yes.

Q And, you mentioned that he mentioned his involvement in some murders.

What murder was that that he mentioned?

A He said a Roman Street murder.

[124]

Q Okay.

Did he mention any others?

A He mentioned a Donnell Banister and Romalace McGee (spelled phonetically).

Q And, so you are saying that Trackling — Can you tell us what Trackling told you?

A He told me that him, Donnell Banister and Romalice McGee had committed murder on Roman Street, a double murder.

BY THE COURT:

He said a "double murder?"

BY THE WITNESS:

A triple murderer.

A murder on Roman Street.

BY THE COURT:

Well, what did he say to you?

He said a murder on Roman Street? He said a double murder? He said a triple murder?

BY THE WITNESS:

A triple murder, with three people.

BY MS. STANLEY:

Q And, who did he say was involved? Who did he say was responsible for that?

A Donnell Banister, Robert Trackling and Romalice McGee.

Q Did he ever mention Juan Smith?

A No, ma'am.

Q Did he ever mention anyone named Short Dog?

A No, ma'am.

Q Okay.

Did he tell you how they fled the scene?

A He said up in a maroon car. I don't know the name of the car, but he said it were maroon.

Q Okay.

[125] You testified that you called your investigator after you spoke with Trackling and arranged to have — to go to the police?

A Yes, ma'am.

Q I am going to ask you some questions about that interview now.

Can you explain a little bit more why you decided to go to the police?

A Because I was sentenced to life for a murder that I didn't commit by a guy, Donnell Banister, that he committed the crime. And, when I talked to Byron Adams, he asked me about a Short Dog. Did I know a Short Dog? So, I told him no. So, he said, did I hear of a Juan Smith? So, I told him no. And, he said that this was one of the guys that was supposed to have been in a murder.

So, he said that if I do him a favor he would go talk to some people and get my life sentence took back. So, he had asked me to involve Short Dog, Juan Smith.

BY THE COURT:

He asked you what? I didn't catch all that.

BY THE WITNESS:

He —

BY THE COURT:

He asked you what now?

BY THE WITNESS:

He asked me to involve Juan Smith in it.

BY THE COURT:

So, Sergeant Adams asked you to involve Juan Smith?

BY THE WITNESS:

Yeah. And, he said that he was going to help get my life sentence took back.

BY THE COURT:

And, you said before that you were in jail facing a life sentence because of Bannister?

BY THE WITNESS:

Yes.

[126]

BY THE COURT:

And, you are saying that the crime that you are serving time for that Bannister committed that?

BY THE WITNESS:

Yes.

BY THE COURT:

Okay.

BY MS. STANLEY:

Q Mr. Rogers, I want to go back to your interview with the police.

Can you tell us who was present?

A My investigator who was hired by my lawyer, Mr. Sam Ring (written phonetically) and Byron Adams. (Written phonetically)

BY THE COURT:

And, who was the investigator? Do you remember his name?

BY THE WITNESS:

Sam Rain.

BY THE COURT:

Sam Rain?

BY THE WITNESS:

Yes.

BY MS. STANLEY:

Q And, who was your attorney for this case? You had an attorney at the time that you gave this interview, correct?

A Mr. Joe Marcal.

Q Okay.

So, was the interview with the police tape recorded?

A Not at first. After he told me about the deal where he going to help get my time get took back on if I help him get Short Dog, Juan Smith, and after that then he turned on the tape recorder.

BY THE COURT:

So, what was your answer to that?

BY THE WITNESS:

[127]

I agreed.

BY THE COURT:

You agreed to what?

BY THE WITNESS:

To do what he said.

BY THE COURT:

Just tell me exactly what you agreed to do.

BY THE WITNESS:

He wanted me to implicate Juan Smith saying that Juan Smith was the shooter.

BY THE COURT:

Did you implicate Juan Smith?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

And, he took a statement from you saying that Juan Smith was part of the shooting on North Roman Street?

BY THE WITNESS:

Yes.

BY THE COURT:

And, you also said that Trackling and Banister and McGee were also involved, is that correct?

BY THE WITNESS:

That's what Trackling said.

BY THE COURT:

Now, how did this come about — this statement?

You informed your investigator that Trackling had this discussion with you?

BY THE WITNESS:

Yes.

BY THE COURT:

And, how did you get from your investigator to Sgt. Adams?

[128]

BY THE WITNESS:

Because my investigator said that he had a friend that he knew and it was Detective Byron Adams.

BY THE COURT:

All right.

So, you were talking about Trackling and Banister and McGee committing the crime on North Roman Street. This is what Trackling told you.

BY THE WITNESS:

Yes, sir.

BY THE COURT:

And, then when your investigator secured Byron Adams, Bryan Adams asked you to add in Juan Smith or Short Dog?

BY THE WITNESS:

Yes.

He asked me did I hear of a Short Dog, Juan Smith.

BY THE COURT:

And, you didn't?

BY THE WITNESS:

No.

BY THE COURT:

You did not do it? You did not give a statement saying that Trackling indicated that Juan Smith or Short Dog was involved in the North Roman Street murder case?

BY THE WITNESS:

No, sir.

BY THE COURT:

You did not.

So, you didn't go along with the idea of Sergeant Adams saying to implicate Juan Smith?

BY THE WITNESS:

I went along with it. He didn't tape it. He had talked to me first [129] about it. So, I agreed and then he turned on the tape.

BY THE COURT:

Okay.

Then he turned on the tape recorder.

What did you do then?

BY THE WITNESS:

I agreed.

BY THE COURT:

Did you give a taped statement involving Juan Smith, AKA Short Dog?

BY THE WITNESS:

Yes.

BY THE COURT:

You did.

On a taped statement?

BY THE WITNESS:

Yes.

BY THE COURT:

Okay.

BY MS. STANLEY:

Q So, going back to before they turned the tape recorder on.

What did you tell police that you knew about the Roman Street murders?

A Excuse me?

Q Before they turned the tape recorder on, what did you tell the police that you knew about the Roman Street incident?

A I told them that Trackling told me that him, Banister and McGee had committed the crime.

Q Okay.

BY THE COURT:

Now, were you convicted of the second degree murder by a jury?

BY THE WITNESS:

[130]

Yes, sir.

BY THE COURT:

And, how long ago was that?

BY THE WITNESS:

1995.

BY THE COURT:

1995.

BY MS. STANLEY:

Q Can you tell us when you first heard the name Juan Smith?

A When I was in the Homicide Office with Byron Adams and Sam Rain.

(Written phonetically)

Q And, did — was it Detective Byron Adams who first mentioned that name?

A Yes, ma'am.

Q And, was that the first time that you had ever heard of that name?

A Yes, ma'am.

Q Did you know who Juan Smith was?

A No, ma'am.

Q And, when was the first time that you heard Short Dog referred to?

A In the office with Detective Byron Adams.

BY THE COURT:

What part of town did you live in, sir?

BY THE WITNESS:

In the Irish Channel.

BY THE COURT:

Okay.

BY MS. STANLEY:

Q About how long did you have this conversation with the police that was not recorded?

A About fifteen or twenty minutes.

Q Okay.

BY THE COURT:

[131]

Is it my understanding that Byron Adams has died? He is deceased now, right?

BY MS. ANDRIEU:

Yes.

BY THE COURT:

Okay.

BY MS. STANLEY:

Q But at some point during your interview, the police started recording, and you gave an official recorded statement?

A Yes, ma'am.

Q Is that right?

A Yes, ma'am.

Q Okay.

BY MS. STANLEY:

Your Honor, may I approach?

BY THE COURT:

What is that?

BY THE COURT:

May I have permission to approach the witness?

BY THE COURT:

Approach with what?

BY MS. STANLEY:

I have exhibit one, which has already been submitted into evidence.

BY THE COURT:

What is it?

BY MS. STANLEY:

It is Eric Rogers' recorded statement that he gave to police.

BY THE COURT:

Okay.

BY MS. STANLEY:

And, for clarity purposes, I just marked the exhibit again.

BY THE COURT:

[132]

Okay.

BY MS. STANLEY:

Q Mr. Rogers, could you please turn to page three, nine, five, six of exhibit one, which is — just for the sake of the record it is the D.A. file that we

received from the District Attorney in the Roman Street matter.

A I have it.

Q Can you please read from your statement where it begins, "All right, I was on C-4?"

A "All right. I was on C-4 and I got the information from Robert. He came up on the — he came up where I was — where I'm at. And, he told me about the first — the first crime — And, he told me about the first crime they done. He said they done it on North Roman. He said that he — uhm — It was him, Fat, Buckle, and a guy called Uhm, Short Dog. Say that they went up to The door and they knocked on the door, and the guy opened the door, and they went in the house. And, they had about seven guys in there. And, they made them lay down on the floor and they was asking the guys were — where's the stuff? And, the guy didn't say nothing. They said that they had a girl in the room. She opened the door and when she opened the door, all of them turned around and said one of the guys that was on the floor jumped up and grabbed his gun from under his shirt. And, he went to shoot at her. They said that they raised up the gun and they went to shooting them. They went to shooting back and hit them and said one of the guys who was shooting that got off of the floor, his gun slid by Darnel Banister's food and Darnel Banister picked up his gun and went to shooting the guy with that gun."

Q Thank you.

Can you flip forward to page three, nine, five, nine?

A Three, nine, five, nine.

BY THE COURT:

Is that in Exhibit One?

BY MS. STANLEY:

Yes, I am sorry.

That is also in exhibit one.

[133]

It is further along in Eric Rogers' statement to police that was recorded.

BY THE COURT:

All right.

BY THE WITNESS:

"Do you know Short Dog?" "No, but Robert described to me."

"Do you know Short Dog's real name? Did he tell you his real name?"

"He said his name is Juan, but he don't give me no last name."

BY MS. STANLEY:

Thank you.

Q So, in the statement you refer to people by some nicknames.

Can you tell us who "Fats" is?

A Darnel Banister.

Q And, who is "Buckle?"

A Kintad Phillips.

Q And, how did you know that?

A Because we grew up together.

Q Okay.

A Went to school.

Q Okay.

BY THE COURT:

You went to school with who?

BY THE WITNESS:

Kintad Phillips and Danielle Banister.

BY THE COURT:

Who?

BY THE WITNESS:

Kintad Phillips and Danielle Banister.

BY MS. STANLEY:

Q And, who was "Short Dog?" What is your understanding of who "Short Dog" is?

A Right now, Juan.

[134]

Q And, why do you know you that? Or, how did you get that information?

A From Detective Byron Adams.

Q So, you had no personal knowledge of who "Short Dog" was until Byron Adams made that statement to you?

A That's right.

Q Okay.

Why did you tell the police that Short Dog was involved?

A Because Detective Byron Adams said that he would help me get my time took back.

Q So, he offered you assistance in your case if you would say that Short Dog was involved?

A Yes, ma'am.

Q Did he offer you anything else, or did he do anything else for you?

A After it ended, he brought me food. He bought me McDonald's.

Q Okay.

BY THE COURT:

When you talked to Detective Adams, were you already sentenced to life?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

Okay.

BY MS. STANLEY:

Q And, was your sentence reduced as a result of your assistance?

A No, ma'am.

Q What did you tell the police about the Cutthroat Posse?

A About the Cutthroat Posse?

Q Uh huh. Did you talk to police? In your statement about the Cutthroat Posse?

A He asked me about the Cutthroat Posse, and I told him that I heard of them. I heard of the Cutthroat Posse before.

Q What had you heard?

[135]

A That they was a group of wild people.

Q Did you know any members of the Cutthroat Posse?

A No, I didn't know any members of the Cutthroat Posse.

Q Do you know if Juan was a member of the Cutthroat Posse?

A No, ma'am.

Q Just one moment.

Let me collect.

Mr. Rogers, could you turn to page three, nine, seven, six of exhibit one?

A All right.

Q I'm sorry.

I gave you the wrong page number.

Could you turn to page three, nine, six, zero?

A Okay.

Q And, this is exhibit one.

And, that is still a part of your statement to police.

A Three, nine, six, zero.

BY THE COURT:

What do you want him to focus on on that page?

BY MS. STANLEY:

I'm sorry.

Okay. Here we go.

I'm sorry, another page number.

Go to page three, nine, six, two of exhibit one which is still your statement to police.

BY THE COURT:

Three, nine, six, two?

BY MS. STANLEY:

Yes.

I apologize for the confusion.

BY THE COURT:

All right.

[136]

BY MS. STANLEY:

Q Did you find that page yet?

A Yes.

Q Okay.

Toward the bottom of the page there is a question that starts with,

"And you also stated that members of the Cutthroat Posse was involved"?

A Okay.

"And you also stated that members of the Cutthroat Posse were involved with the murder of Jerome Perry Wammy?" (Written phonetically)

"Right."

"Was he a member of their group? He wasn't a member of the Posse?

Of the uhm, the Cutthroat Posse?" "No."

"How do you find out about information about Jerome Perry? Uhm, the guy that they got on the charge for it, they was —"

Go to the next page?

Q Yeah.

If you could keep reading?

A "Telling me that Wammy was the one. Said that AK told Wammy to kill Jerome because AK thought that Jerome was going to court on him for the murder that he done. Okay. Do you know who AK is? Yeah. What's his name? His name is Jermaine (written phonetically) Baker. And, Jermaine is he still in jail on the charge? Yes, he got found guilty to two counts of first degree murder. And, who know — who now told you that Wammy is the one who killed Jerome Perry? He told me it was Marlon Jackson (spelled phonetically), Marlon Jackson who was on the charge for that for Jerome murder."

Q Okay.

Thank you.

That's enough.

* * *

A BRIEF BRAKE [sic] IS TAKEN BY THE COURT.

* * *

[137]

BY THE COURT:

All right.

Go ahead.

BY MS. STANLEY:

Q Mr. Rogers, now that you have had a chance to read your statement, do you remember now that you told police about a number of members of the Cutthroat Posse and various crimes for which they were responsible?

A No, ma'am, I can't remember that.

Q But, you have read your statement so you know that it happened, right?

A Yes.

I read it, but I don't remember it.

Q Do you know if Donnell Banister was a member of the Cutthroat Posse?

A No, ma'am.

Q You don't know?

A No, ma'am.

Q Or, you —

BY THE COURT:

I didn't understand that.

What did you say?

BY THE WITNESS:

No, sir.

BY THE COURT:

You are saying that you didn't know whether Banister was a member of the Cutthroat Posse?

BY THE WITNESS:

A A member of the Cutthroat Posse, yeah.

BY THE COURT:

Any other questions?

BY MS. STANLEY:

Yes, I have a few more.

Q So, going back to what Trackling initially told you about when you [138] were in a cell with him, did he tell you that he was involved in any other murders?

A He said that he was involved in a murder in the East somewhere — somewhere in the East.

BY MS. GRAUGNARD:

Your Honor, the State is going to object to the relevance of the any murders that Robert Trackling may or may not have been involved in.

BY THE COURT:

Objection sustained.

BY MS. STANLEY:

May I respond, Your Honor?

BY THE COURT:

Yes.

BY MS. STANLEY:

Basically we are here on a Brady Hearing to establish that there were statements out there that Robert Trackling had confessed to his involvement in this, in this Roman Street murder. So, it is highly relevant, you know, as to whether those were disclosed to defense counsel.

BY THE COURT:

It is relevant that he committed other murders?

How is that relevant to this?

BY MS. STANLEY:

It goes towards how credible he was in the later Morrison Road case.

BY THE COURT:

Well, how does that establish credibility?

I don't understand that.

No.

BY MS. STANLEY:

Q Mr. Rogers, was this the only interview that you had with police about the Roman Street incident?

[139]

A Yes, ma'am.

Q Were you ever interviewed by Juan Smith's lawyer?

A No, ma'am.

Q Frank Larre?

A No, ma'am.

Q Did you know Robert Trackling before you shared a cell with him?

A I saw him, but I never stopped to talk to him or nothing like that.

Q Okay.

So, is it fair to say that you knew who he was but you weren't friends?

A Yeah.

Q Did Trackling ever tell you that Short Dog was Juan Smith?

A No, ma'am.

Q Did Trackling ever mention Juan Smith's name?

A No, ma'm.

Q Did you have any other conversations with Trackling after you gave your statement to police?

A No, ma'am.

BY MS. STANLEY:

No further questions, Your Honor.

BY THE COURT:

Any other questions by the State?

BY MS. GRAUGNARD:

Your Honor, the State has two very brief questions.

* * *

CROSS EXAMINATION

* * *

BY MS. GRAUGNARD:

Q The first question for Mr. Rogers is have you ever spoken with or communicated with Juan Smith while you have been incarcerated?

A No, ma'am.

Q Have you ever communicated with him in any way in recent years?

A No, ma'am.

[140]

BY MS. GRAUGNARD:

The State tenders the witness, Your Honor.

BY THE COURT:

Any other questions?

BY MS. KELLY:

Yes.

I want to do the redirect.

* * *

REDIRECT EXAMINATION

* * *

BY MS. KELLY:

Q Just a few questions, Mr. Rogers.

Do you — Do you know Juan Smith at all?

A No, ma'am, not personally, no, I don't know him.

Q Okay.

Q But, you knew Donnell Banister, Kintad Phillips and Robert Trackling?

A Yes, ma'am.

Q Okay.

And, do you recall after you talked to Byron Adams another detective named John Ronquillo ever coming to question you about Roman Street?

BY MS. GRAUGNARD:

Your Honor, I am going to object.

I did not ask any questions of this sort, so it is improper for her to redirect him on this other information.

BY THE COURT:

I am going to permit it though.

Go ahead.

BY MS. KELLY:

This is our witness.

BY THE COURT:

I said that you could go ahead.

[141]

BY MS. KELLY:

So, I can ask him.

BY THE COURT:

Ask the question.

Did you ever talk to Detective Ronquillo?

BY THE WITNESS:

I can't remember.

BY THE COURT:

Did you ever talk to any other person involved in the police department in regard or reference to the North Roman Street murders?

BY THE WITNESS:

No, sir.

BY THE COURT:

Okay.

BY THE WITNESS:

Nobody.

BY THE COURT:

So, the only person — you are telling me that the only person that you talked to in reference to the North Roman Street murders was Byron Adams?

BY THE WITNESS:

Yes, sir.

BY MS. KELLY:

Okay.

And, just one other question.

Q Even after Byron Adams told you that he wanted you to implicate Juan Smith, you never said Juan Smith's name in your tape recorded statement. You just said, "Short Dog," isn't that correct?

BY MS. GRAUGNARD:

Objection, Your Honor.

He has been asked and answered this question several times.

BY THE COURT:

[142]

Well, it will speak for itself, but he can answer that question.

BY THE WITNESS:

Yes, ma'am.

BY THE COURT:

All right.

BY MS. KELLY:

All right.

Thank you.

You are excused.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

Transcript in the Above entitled Matter, as Heard Before the Honorable Frank A. Marullo, Jr., Judge Presiding, Under Date of January 14, 2009

Appearances:

Donna Andrieu, Esq. Alyson Grangnard, Esq.	Counsel For The State **Assistant District Attorney**
Kathy Kelly, Esq. Kristen Stanley, Esq.	Counsel For The Defense

* * * * *

TESTIMONY OF JANIE MILLS

* * * * *

[19]

Do you have, do you remember escorting Mr. Boatner to the detectives back in June of 1995?

A I remember walking a gentleman around there.

Q Okay.

And, did you deliver him? Did you escort him to the detectives?

A And yes, and I stayed in the room, and I spent most of my time over at the window looking down while they talked over in another area — in the corner with him.

Q So, it is your testimony then that you weren't in a close proximity to Mr. Boatner when he was with the two detectives?

A That's correct.

[20]

Q Okay.

And, from where you were during his meeting with the two detectives, could you overhear the conversation?

A I can't remember that.

I don't think so.

I didn't really hear anything.

I guess if I heard any noise or whatever I would have known, but when I walked over to the

window I just weren't paying them any attention.

Q Okay.

Were you able to observe Mr. Boatner's demeanor? How he acted? And, are you able to remember that?

A As far as I can remember, I can't remember no demeanor.

Q Okay.

Did Mr. Boatner — Well, I am going to be a little bit more specific and obviously you can only remember what you can remember, but did he appear to be distressed that the detectives were there?

A Not that I can recall.

Q Okay.

Did he appear to be distressed —

BY MS. KELLY:

Objection, Your Honor.

I am going to say that has been asked and answered multiple times now that she doesn't recall.

BY THE COURT:

I am going to let her ask it.

Go ahead.

BY MS. ANDRIEU:

Q Did he appear to be distressed during his meeting with the detectives?

A Not that I can recall.

Q Okay.

And, when his meeting with the detectives was over, did you have the opportunity to escort Mr. Boatner back to where he needed to be?

[21]

A Yes.

Q And, do you remember escorting him back to his unit?

A I only remember because I know that if I escorted him over then I had to escort him back.

Q Okay.

A That's all.

I don't remember talking or anything.

Q Okay.

BY THE COURT:

So, you say that you were in the same room with the detectives and Mr. Boatner, but you said that you were looking at Tulane Avenue.

BY THE WITNESS:

Yes.

BY THE COURT:

Okay.

BY THE WITNESS:

I was looking out the window.

BY THE COURT:

But were you paying much attention to what was happening between the police officers and Mr. Boatner?

BY THE WITNESS:

No, I wasn't paying them no attention.

* * * * *

TESTIMONY OF LARRY BOATNER

[24]

LARRY BOATNER, called as a witness by the State, after being duly sworn by the Court, testified as follows:

* * *

DIRECT EXAMINATION

* * *

BY THE COURT:

Would you take the witness stand?

Would you identify yourself for the record?

State your name for the record.

BY THE WITNESS:

My name is Larry Boatner, Jr.

BY MS. ANDRIEU:

[25]

Q Okay.

Good morning, Mr. Boatner.

I am Donna Andrieu on behalf of the State.

And, just as an initial matter, Mr. Boatner, you and I have met, is that true?

A Yes.

Q Okay.

And, again, just as a matter of record, have you also met the young lady at the other end of the table? My table here with the bluish green blouse?

A Yes.

Q Okay.

BY MS. ANDRIEU:

And, for record purposes, the person that I am identifying is Alyson Grangnard, an Assistant District Attorney also assigned to this case with me.

Q During your meeting with Ms. Grangnard and myself, did we ever suggest to you any testimony that you should offer before this Court?

A No.

Q Okay.

And, in fact, did we ever show you any documents or transcripts to refresh your memory?

A No.

Q Okay.

Thank you.

Having said that, Mr. Boatner, you are called her to testify to your knowledge of events back in March the first of 1995.

And, in the early evening of March the first of 1995, do you recall where you were?

A Yes, I do.

Q And, where was that?

A On North Roman Street.

[26]

Q And, do you recall the address on North Roman?

A I don't remember exactly the address.

Q Okay.

What were you doing? I am assuming that you were at a house? Inside the house?

A At the time that I was there?

Q Yes.

A Just hanging around with some of my friends.

Q Okay.

Do you remember what friends were in the house with you?

A Yes. It was me, Robert, Ed, Jack, Will, and really a friend that I don't know, Reginald. I knew him as Reg. (NOTE: All proper names are spelled phonetically) And, Shalitta was there also

Q Okay.

And, in the early evening of March the first of 1995, did you have the occasion to open a door?

A Yes.

Q And, what drove you or caused you to open the door?

A Well, we were sitting at the table. It was a car sitting outside, just sitting in front of the door, running like it needed a muffler or something like that.

I don't remember, but it was real, real loud. So, I was like, "Man, let me go check and see who this is." Why is that car in front the door?

So, I went to the door, so that is what made me get up and go to the door.

Q Okay.

And, can you tell the Judge, please, when you went to the door, what happened?

A When I opened the door, I was approached by two males. One of them came to the door with a gun in my face, and asked me, questioned me about "Where was the weed?" And it just started then.

And, they told everybody to get down on the floor. So, —

[27]

Q Can you identify the person who was at the door with the gun in your face? Is he in the courtroom today?

A That dude right there (witness indicating).

BY MS. ANDRIEU:

Your Honor, let the record reflect that Mr. Boatner has identified Juan Smith.

BY THE COURT:

The record will so reflect that.

BY MS. ANDRIEU:

Okay.

Q Have you ever before that time seen Juan Smith?

A Never.

Q Okay.

And, when you opened the door, how far were you — how far was your face from Juan Smith's face?

A Enough for just to have a gun in your face like this (witness indicating). And, I looked at him, like that, and he was like everybody get down on the floor.

Then he turned me around and he had the gun on my head.

Q And, what did you do?

A I stood up and I looked around because, like, you know, Shalitta was on the phone at the time. So, I was thinking, you know, that this has got to be a joke you know, because I just thought that somebody was playing. But, me and my friends we don't play like that, so I was really like tripping out on that.

So then they was like telling everybody to get down on the floor. I was still standing up at gunpoint of course.

The door was closed. Reba (spelled phonetically) and her friend were in the back. And, he demanded me to get down on the floor so he pushed me down and still had the gun on

my head. Then I seen this other person walk by with all I could see was the clip. I know that it was an AK 47 because I know how they look.

[28]

I saw the end of the barrel with the clip, and it was like another clip wrapped around it with like tape.

So, then, that particular person was allowed to get up, and still at the same time, this other person with the gun on my head, which is Juan, I know that for a fact, he is telling me to stay on the floor. And, this other fellow is telling me to get up. So, I am like, I don't know what to do"

And so, at this time, he grabbed me by my shirt, which is Juan, grabbed me by my shirt and pulled me up off the floor and put the gun under my chin. And, at this time I am scared as hell. So, I am just like started — you know, like somebody says, "They scared the piss out of me" So, that is what happened. I started to actually pee on myself. I said, "Damn".

So, then, I just said, "The hell with it." So, I said, "What the fuck you all want me to do? You want me to lay down on the floor or do you want me to stand up. So, at this time he got made and said, "Bitch", and he hit me in the head, on the back of my head with the gun.

And, at that time, I just took a few steps and just fell, like pretending you know, that I was knocked out.

And, at this time, my friend Reba, she comes from the back, like when she heard the noise, it

was like, "Man, what the fuck you all doing?" You know.

And, I was just laying there. So, she opened the door because the door was closed and .they demanded — and I don't know exactly who or how many it was, but they demanded her to lay down on the floor. And, she slammed the door because they said, "Bitch, get on the floor with them." And, she slammed the door, and then after that it was just a number of gunshots. A lot of gunshots. And, I just laid there.

And, the next thing I know after all the shots was over with, I just got up and I said, "Man, you all right?" And, I turned around, and there was just blood everywhere. The house was just totally a mess. And, I am looking around, and I'm like, "Fuck."

I was tripping out.

So, I am looking at everybody.

[29]

So, then I ran to the back because I knew that Reba was back there with a friend of hers, which is Reg, Reginals, or whatever.

So, when I went back there to check on them, the door was closed, and I knocked on the door. And, as I said, "It's Larry. Larry. Larry. It's Larry. Don't shoot. Don't shoot." Because I know her friend, he always carried a gun. So, when I opened the door, he had the gun pointed at me. He was like, "I didn't know if they still like had you, you know, at gunpoint or whatever."

So, I said, "Man." So, everybody was like, "Well, where is Rob? Where is Rob?"

I just looked at Reba because she was asking where Rob was. And, I was just like, "He gone." And, she just started screaming. So, I started like walking around trying to see and count and look for my friends. And, I noticed that right in the doorway where Reba came in at, there was somebody else. When I looked at all of my friends, and I noticed that I didn't know him. So, I am like — he was lying on one his arms, and he was just moaning, like, "Oh, oh, oh."

So, — I said, "Reba, we got to call the police." Well, actually I was asking him who he was and who was the dude he was with and all of that. So, I started kicking him in the head and I reached in his pocket because I noticed that he had a pager at the time. And, his pager was going off like on vibrate. So, I reached in his pocket and I took it out and I looked at it. And, all it had on it was one, eighty-seven, (written phonetically) which that's homicide which everybody basically knows what that is. So, whoever it was kept calling, but the only thing they kept putting in there was one, eighty-seven.

So, I just took that and put it in my pocket. At that time the police and everything was coming, the ambulances and everything. And, they took me out. They took me to the hospital. They were saying that I was shot in the head, which I wasn't. Thank God I wasn't, but that's what happened.

Q Okay.

And, Mr. Boatner, once you opened the door, and Juan Smith was there, with the distance of a gun between you and him, as you just testified, [30] was Mr. Smith's face covered?

A No.

Q Okay.

A His face wasn't covered. And, also the guy that they left there wasn't covered. Neither one of them had a mask.

Q Okay.

And, when you say the guy that they left there, do you mean the guy that was remaining with the pager that said, "One, eighty-seven"?

A Yes.

Q Okay.

Did that person, who you didn't recognize, did he have a gun on him?

A Not to my knowledge.

Q Okay.

And, was he masked?

A No.

Q Was his face covered in any way?

A No.

Q Okay.

Were you able to see the car when you opened the door?

A Yes. It was a white four-door. It was an old car. I don't know exactly the make of it, but it was a white car.

Q And, was there anything else distinctive about it?

A The car?

Q Yes.

A It was loud like it needed a muffler. It was real, real loud. I can say that is what caused me to go to the door because I am like, "Why is this car in front of the door just sitting there?"

Q Okay.

A And, I was just really trying to be nosey and see who it was.

Q Okay.

How did you know that Reba — When you went down on the floor, did you keep your eyes open or did you keep them closed?

[31]

A Closed.

Q Okay.

The entire time did you keep them closed

A Not the entire time, but I closed them, especially when the shots started.

Q Okay.

And, when Rebee came to the door, how did you know that it was Rebee (spelled phonetically)?

A Because I know Rebee's voice.

Q Did you —

A She was the only one that day, and I know Rebee's voice. I mean, that's my friend.

Q Okay.

A And, I mean, we lived together for a while.

Q Okay.

Did you see her when she came to the door?

A No, I didn't.

Q Were your eyes closed when she came to the door?

A No.

Q When Rebee came to the door, were your eyes closed or opened?

A My eyes were opened then.

Like I said, I didn't close my eyes until the gunshots.

Q Okay.

Were you able to see the faces of anyone else?

A No.

Q In the room?

A No.

Q Okay.

Okay.

Do you remember making an identification of Juan Smith?

A Yes.

Q Okay.

[32]

And, do you remember where you were when you made that identification?

A I was in the hospital.

Q Was —

A In Charity Hospital.

Q Thank you.

Okay.

And, was there anyone else present when you made the identification?

A No, just detectives and me.

Q Okay.

Do you remember which detectives? Do you remember the names?

A No.

Q Do you remember how many detectives?

A Two.

Q Do you remember if there was anyone else from the hospital with you?

A I don't remember that.

Q All right.

Okay.

And, at any time did you feel forced or coerced into making an identification at all?

A No.

Q When you made the identification, did you make it willingly?

A Yes.

Q And, when you made the identification, were you sure of the identification?

A Yes, I was.

Q Were you able besides Juan Smith, did you see anyone else who had stormed that house?

A No. The only face I saw was his face.

Q Okay.

And, had you told that to the detectives?

A At the time, that's all I could tell them. The only one I could identify [33] was Juan.

Q And, why are you so sure that it was Juan?

A Because I'll never forget his face.

Q Okay.

A And, I said that last time. Never.

Q Okay.

BY MS. ANDRIEU:

Your Honor, the State tenders the witness.

BY THE COURT:

Tendered to the Defense.

* * *

CROSS EXAMINATION

* * *

BY MS. KELLY:

Q All right.

Mr. Boatner, when you were at Charity Hospital, do you remember a woman named Anna Bloom?

A No.

Q Okay.

Do you remember being — having different social workers or people that you talked to while you were being housed there?

A No, I don't.

Q Okay.

So, what do you recall of your experience at Charity when you were in rehab? Were you there for counseling?

A I was there because at the time, after this incident, I was kind of upset and —

BY MS. ANDRIEU:

Objection, Your Honor, as to relevance.

BY THE COURT:

No, I am going to permit it.

Go ahead.

[34]

BY MS. KELLY:

Q If you could continue what you were saying.

A At that time, after that incident, I couldn't sleep. I couldn't even believe that happened. So, I was drinking very, very heavily. So, what I did, I

just admitted myself to the hospital because I was losing it. I was suicidal. I was on the edge about killing myself and all that kind of stuff. So, I just couldn't believe that happened to my friends.

Q Okay.

And, on the day that you made the identification at Charity Hospital, didn't detectives — Isn't it true that Detectives came to see you hours before that on that same day?

A No. Not to my knowledge. I don't remember that.

Q Okay.

And, didn't you also — Isn't it true that you told personnel at Charity Hospital that you were feeling threatened and coerced and you didn't want the officers to come back?

A No.

Q Okay.

And, you don't recall a social worker at Charity Hospital named Anna Bloom, who spoke to you?

A No.

BY MS. ANDRIEU:

Objection, Your Honor.

BY MS. KELLY:

I'm sorry.

Q Anna Blossom?

Let me rephrase that.

BY MS. ANDRIEU:

Asked and answered.

BY THE COURT:

He has answered the question.

Sir, do you recall Ms. Anna Blossom?

[35]

BY THE WITNESS:

No, I don't.

BY MS. KELLY:

Q Do you recall telling anyone at Charity Hospital while you were staying there, talking about the incident and what your fears were, or do you have any recall of discussing that with social workers or anyone at the hospital?

A I don't recall talking to anybody about it.

Q Okay.

And, is it your memory that definitely no one came to see earlier, or you just don't recall?

A I don't recall that at all.

BY THE COURT:

I think he answered your question before.

BY MS. KELLY:

Well, I mean, I am just wondering if he has a specific memory that anybody did.

BY THE COURT:

He answered that question.

Move on.

BY MS. KELLY:

Q Okay.

All right.

Mr. Boatner, you were interviewed multiple times by New Orleans Police Detectives about this case, isn't that correct?

A I wasn't interviewed. I was just shown some photos to see if I could identify anybody that was in the photos. That was it.

Q No.

What I am saying is at the time that the shooting occurred, are you saying that no officers ever spoke to you until four months later when you were at Charity Hospital?

A No.

[36]

Before that.

After I got out of the hospital, yeah, I went and spoke to the officer at that time.

Q Right.

And, that is what I am asking you.

A Oh.

Q Right at the day that the incident occurred, and afterwards, approximately how many times did you talk to police officers?

A I spoke with them, I remember, that time right after the incident. But then after that, all I can recall is looking at photographs, photos, photos, photos.

Q So, you are saying that you only spoke to an officer about what happened one time until they came back with the photos?

A I don't recall talking to them again about it. I don't remember. I just remember looking at a lot of photos.

I was — I mean, after that I was — I mean that was something else.

BY THE COURT:

I think he has answered your question.

He doesn't recall.

BY MS. KELLY:

Okay.

Q Do you recall telling officers that you would not be able to identify anyone? You would only be able to identify the car.

A No.

Q Do you recall telling officers, "I can't recognize. I won't be able to identify anyone. I was too scared to look at anyone."?

A No.

Q Do you recall what your testimony is or what — at the trial about what weapon you described Mr. Smith carrying?

A I remember that very well.

Q Okay.

So, you said —

[37]

BY THE COURT:

Wait a minute.

Let him tell you.

BY THE WITNESS:

It was a nine millimeter chrome.

BY MS. KELLY:

Q And, do you remember what you described any other individuals carrying as weapons?

A The only thing I saw was like I said, an AK 47, the barrel and the clip. I didn't see the person carrying it. I know it was somebody else carrying it.

At the time, it was two people in the house that I knew of for sure.

Q Okay.

Do you recall now whether there were only two people in the house or was there three people in the house, or how many people were in the house?

A I don't know how many people was in there. But, I know at that time it was two, for sure, like I said. It was Juan and someone else.

Q Okay.

A Now, whoever — if anyone else entered the house, I really don't know.

Q And, the gentleman that was lying on the floor that you didn't recognize — I'm sorry — that you said you had — that was there after the

crime shot, did you see him or what he was doing at the house at any point?

A No.

Q Okay.

And, do you recall that there was clothing found inside the home, Reba's home, that didn't belong to any of you?

A I have no idea about that.

BY MS. ANDRIEU:

Objection as to relevance.

BY THE COURT:

Objection sustained.

BY MS. KELLY:

The relevance, if I could go on, Your Honor, is Mr. —

[38]

BY THE COURT:

Well, he has answered your question.

He said he doesn't recall.

So, move on.

BY MS. KELLY:

Okay.

Q Okay. So, you are not sure, at this point, if there were only two men. And, is that correct?

BY MS. ANDRIEU:

Asked and answered, Your Honor.

BY THE COURT:

I think he has answered that question.

BY MS. KELLY:

Okay.

Q Did you see the people leave the home?

A No, I didn't.

Q Okay. And, did anyone in the house own a shotgun?

A A shotgun? Not that I know — well, somebody did have one there, yeah.

Q Okay.

Do you recall right after the shooting you or anyone else from the house running out to check on your friend that was outside?

A Yes, I did.

Q You did?

A I did.

Q Okay. And, do you know approximately how many minutes after the people left before you went outside?

A I don't know because I waited a while. Because, what happened, after the shots, I laid on the floor. Then I heard three car doors slam. Boom, [39] boom, boom, and then the car pulled off.

At that time, I still laid on the floor, so I could say maybe five to ten minutes.

Q Okay. And, do you know if Reginald Harbor (spelled phonetically) went outside prior to you or Reba or anybody else left the house?

A No. They didn't leave. Reginald didn't leave the house until after all the shooting because — and he had only one leg, so he hopped out of the house with his wheelchair.

Q Okay.

And, were any of the men that you saw, did you see anyone carrying a shotgun?

A All I saw was the nine millimeter and the AK. Anything else — I don't know if he had a shotgun in the bathroom.

Q Okay.

And, didn't you tell the police on the first day that you spoke to you that one person was carrying an AK 47, another person was carrying what you described as a Tech Nine, or — yes, a Tech Nine, and that the man you identified as Juan Smith was carrying a chrome silver handgun?

A I told them it was a nine millimeter that he had, which he hit me in the head with. I told them about the AK 47.

Now the rifle that was in the bathroom, I believe that was a four, ten shotgun.

Q Okay. And, that belonged to who?

A I don't know.

Q Okay.

But, that wasn't — That was at the house.

A That was already at the house.

Q Okay.

And, do you know if Reginald Harbor grabbed the shotgun to try to protect anyone afterwards?

[40]

BY MS. ANDRIEU:

Asked and answered, Your Honor.

BY THE COURT:

I am going to permit it.

The gentleman that you went out to see, was he — He was in the yard, is that right?

BY THE WITNESS:

It was like the stairs are right here, and he was in the alley, because this is like a little walkway between here. This was my friend.

BY THE COURT:

Was he killed?

BY THE WITNESS:

He was dead.

BY MS. KELLY:

Okay.

Q And, Mr. Boatner, Shelitta Russell, did you talk to her after the shooting at any time?

A No, I never saw Shelitta after that at all. Not even at her funeral because she was so messed up it was a closed casket.

Q Okay. And, she was in the hospital for a while afterwards, is that correct?

A She died March the tenth.

Q Okay.

And, did you ever see from the day of the shooting —

A No, I wasn't even allowed to go up there to see her.

Q Okay.

And, did — When you were questioned by the police, did they ever infer that if you didn't make an identification they might think that you were involved?

A No.

Q Okay.

[41] Did the police ever question you about the fact that you were the only person in the living room that was not shot?

A Yes, a lot of people, even my friends' mothers asked me why am I still alive and their sons dead.

Q Okay. But, do you recall the police questioning you about that?

A Yeah, everybody.

Q Okay. And, can you relate what you — Do you remember the exact conversations?

A I don't remember exactly what words, but if you think about it, you the only person that lives around this type of stuff, you say why would you

still be alive. Why wouldn't you be dead also if you didn't have anything to do with it, but that was my friends.

Q Right.

A All of them were my friends.

Q Right. But, you remember — Do you remember which officer or detective asked you those questions?

A No, I don't.

Q Were you ever read Miranda Rights when you were questioned?

A Who?

Q Miranda Rights?

A I don't even know what that means.

Q Warned that if you made any statements they could be used against you.

A Yeah, of course.

Q You were?

A I don't remember that, but I know that I was read my rights.

Q Okay.

And, do you remember if that happened at Charity Hospital or if it happened prior to that?

[42]

A I don't remember.

Q Okay.

And, of the two detectives that interviewed you at Charity, do you recall besides Ronquillo who the other detective was?

BY MS. ANDRIEU:

Asked and answered, Your Honor.

BY THE COURT:

He has answered that question already.

BY MS. KELLY:

Okay.

Q Well, if you could just —

BY THE COURT:

No.

BY MS. KELLY:

Q Okay.

Was it a detective that you ever had met with or seen previously?

A Yes.

Q It was?

A Yes.

Q So, someone you recognize, but you just don't know what his name is?

A I don't know.

Q Okay.

And, where had you seen him previously?

A I remember seeing one. I don't recall how many people. Like I said, I seen detectives and then I

seen pictures, just pictures. All I can remember is pictures, pictures.

Q Okay.

And, did you meet prior to your trial testimony with any D.A.'s to go over your testimony? I am talking about the time before the trial?

Do you recall that?

A Yes.

[43]

Q Do you remember who you met with?

A I don't

Q Okay.

And, do you remember if any of your interviews were taped with either the D.A.'s Office or the Police Department?

A Not that I know of.

I don't remember ever being recorded.

Q Okay.

Now, while you were at Charity Hospital — At Charity Hospital some four months after the crime occurred, is that correct?

A Yes.

Q Okay. And, when you were there, before you made your identification, did you have any knowledge that the police might have anyone in custody that was involved in the case?

A I remember that three were some people that might have been involved in it. So, that's all. I

don't know. I don't remember all of that. I wasn't in the hospital at that time. I was at my mother's house.

Q Okay.

And, do you remember approximately — when — what months that that was?

A No, I don't remember what month.

Q Well, how many months after the crime?

A I don't remember that.

Q Okay.

Was it close in time to the time that you made your identification?

BY MS. ANDRIEU:

Objection, Your Honor, as to relevance.

BY THE COURT:

I am going to permit it.

If he knows.

If you know, you can answer that.

[44]

BY THE WITNESS:

I don't remember exactly what month it was.

Like I said, after that incident, I was — whew — Even to this day, it still messes me up.

That is every day that I have to live with that.

BY THE COURT:

He has answered your question.

BY MS. KELLY:

Okay.

Q And, —

All right.

Was the — Do you recall that your trial testimony was that Mr. Smith was the first man that walked through the door?

A Yes, he was.

Q Okay.

And, — let me see.

I just have a few more questions for you.

Do you recall anything about telling anyone that you saw Mr. Smith's picture in the newspaper?

A This is how that went.

I was at my mother's house, and a friend of mine called me — a friend of the family called me and said, "Have you seen the newspaper today?" I said, "No." He said, "Well, you need to go — why don't you go get the newspaper and look at those pictures and see if you know anybody on that lineup that may have been involved because that is what the article is saying. After I read it, that's what the article said."

But, as soon as I seen the paper, I saw his face.

Q Okay.

And, do you know how your friend would possibly think that Mr. Smith was involved in your case when his picture was being displayed on a completely different case?

BY MS. ANDRIEU:

Objection, Your Honor. [45] Speculation.

BY THE COURT:

Objection sustained.

What his friend would think?

Sustained.

BY MS. KELLY:

Q Well, did your friend tell you why he believed that?

A It was in the article that they may have had something to do with the incident. That's all he told me.

I read the article myself. I still have the article.

Q So, your testimony — Okay.

And, so prior to you making your identification, you already knew that these people were suspected of being involved?

A I didn't know that for sure. I just looked at the pictures then.

When I saw his face in that lineup, I knew that was him right there.

Q But you saw it earlier.

Did you see the picture in the newspaper prior to seeing the picture in the lineup?

A No.

Q Okay. But, the picture was from June.

I'm sorry.

The newspaper article, I believe, that was from June the fourth or June seventh. You made your identification on June the 28th.

So, you are telling me that you didn't look at this newspaper until it was three or four weeks old?

A No.

I looked at the newspaper.

After I saw that and I read the newspaper that he was still on the loose, to tell you the truth, I went and I called some of my friends cause we was going looking for you, my brother. But, my mom said any one of my friends [46] showed up at her house she was going to call the police on us, so that didn't happen.

So, what I did, I was upset, and I left town.

Q Okay.

And, prior to this lineup, you were shown other lineups with other suspects, is that correct?

A Yes.

Q Okay.

Do you know approximately how many different lineups you were shown?

A I saw so many pictures. I don't know. Maybe three hundred or five hundred. I don't know. It was a lot of pictures.

Q Okay.

And, in those pictures that you were shown prior to seeing Mr. Smith's was his picture in any of those previous lineups?

A No.

I saw a picture of another dude that looked similar to him, the way he looked. The haircut was the same. And, I thought that maybe that could be him, but then I said, "Wait." And, I looked at it. I asked the detectives, I said, "Does he have golds in his mouth?" They told me, "We can't tell you that. You have to be a hundred percent sure that this is the guy." So, I told them, I said, "No, it is not him."

Q Okay.

And, you weren't able to give the police any description on height or weight or clothing, is that correct?

A Yes, I did give a description.

Q Okay.

As far as the peoples' height and weight, can you tell me what you told them?

A I told them he was shorter than me of course. He was a little heavier than me. His haircut is faint (written phonetically) on the side and there was a little at the top, and the top and bottom of his mouth had golds, whole top, [47] whole bottom.

That is exactly what I told them.

Q Can you explain why your trial testimony, you said that you couldn't describe the height and weight and you now can?

A I didn't say that I couldn't describe him on his weight and whatever.

Like I said, I know he was shorter than me, heavier than me, and I remember his face and his mouth.

Q Did you now a man in your neighborhood that is referred to as Dukie?

A My neighborhood?

Q Yeah.

Oh, I'm sorry. Did you live in the same neighborhood as Reba?

A No, I didn't.

Q Okay.

In Reba's neighborhood, did you know a man that was referred to as Dukie?

A I don't know nobody around there.

Q Okay.

Did you know Danielle Bannister, Kintad Phillips, or Robert Trackling?

A No.

Q And did you know the man that was Phillip Young prior to this incident?

A No, I didn't.

Q Did you ever see Juan Smith before?

A Never.

Q So, do you know someone named Jerome Perry or Jerome Petite?

A No.

Q Okay.

Did anyone in the house — I'm sorry. Was anyone else expected to come over to Reba's house that evening that you can recall?

A No.

[48]

Q Okay.

Were you ever questioned by an F.B.I. agent named Kathy Adams?

A I don't remember names. I don't know.

Q Do you remember if you were questioned by anyone from the F.B.I.?

A I don't remember being questioned, no.

Q Okay.

BY MS. KELLY:

I think that the Defense tenders the witness.

BY THE COURT:

Tendered back to the state.

BY MS. ANDRIEU:

Thank you, Your Honor.

REDIRECT EXAMINATION

BY MS. ANDRIEU:

Q Mr. Boatner, the article in the newspaper that you saw, did that influence your picking Juan Smith out of the lineup?

A Actually when I saw the newspaper, I didn't even read it. I just saw his picture and said, "That's him."

Q Was his the only picture there?

A No.

Q In this newspaper article?

A There were four people.

Q Okay.

A I still have the article.

BY MS. ANDRIEU:

Your Honor, may I approach the witness?

BY THE COURT:

Sure.

BY MS. ANDRIEU:

Q Mr. Boatner, I am going to show you what I have previously marked as [49] State's Exhibit C, for purposes of this hearing. Do you recognize this exhibit?

A Yes.

Q And, would you tell me what this is?

A That's the lineup that was in the newspaper article.

Q Okay.

A That's a copy of it.

Q Okay.

And, you are saying that this is the newspaper article that you saw?

A Yeah.

Q Okay.

When you saw this photograph — when you saw this article, what did you do? When you first saw it?

A I saw his picture, and that was it. I flipped out immediately.

That's when I was like, "That's him."

And, then I found out that he was still not in custody, so that's when I said that I called my friends. I was going to go look for him.

Q So, when you saw the picture, had you read the article first?

A No.

Q Okay.

So, there are three other photographs here.

Are those photographs meaningful to you in any way?

A I never saw them. I wouldn't know them if I saw them today besides looking at those pictures.

Q And, see this. Did this influence your identifying Juan Smith?

A Yes.

Q Did this influence your identifying Juan Smith to police officer?

A When I saw the picture, like I said, I was going to look for him, but my mom, she was like, "No." So, I left town. So then I made a phone call and they said that he was in custody that I needed to come and testify or whatever if that was him and this kind of stuff like that. So, I came back.

Q Mr. Boatner, when you were laying — after you had been hit and you [50] were lying on the floor, is it safe to say that you were too scared to look at the other people who were in the room?

A Yeah.

Q And, has anyone from the District Attorney's Office, either myself or Ms. Grangnard or before trial did any of the prosecutors or any of the assistant district attorneys that you dealt with, have any of them encouraged you to say anything that wasn't true?

A No.

Q Would the opposite be true? Have you been encouraged to only tell the truth?

A I'm telling the truth.

Q Thank you.

And, have any of the officers that you dealt with encouraged you to lie?

A No.

Q Have you — Have you — Strike that question.

The identification that you made of Juan Smith, if I were to ask you to put it at a percentage, or when you made it, were you five percent sure? Ten percent sure? How sure were you?

BY MS. KELLY:

I am going to object.

BY MS. ANDRIEU:

Q How sure are you of the identification that you mad?

BY MS. KELLY:

I'm sorry.

I object on the grounds that he already made the identification.

He has already testified at the trial.

BY THE COURT:

Objection overruled.

Continue.

BY MS. ANDRIEU:

I'm sorry?

[51]

BY THE COURT:

You can continue.

BY MS. ANDRIEU:

Q How sure are you of the identification that you made?

A I am one hundred percent sure.

Q Okay.

BY MS. ANDRIEU:

No further questions.

BY THE COURT:

Any other questions?

BY MS. KELLY:

Can I use this?

RECROSS EXAMINATION

BY MS. KELLY:

Q Mr. Boatner, when I questioned you earlier, you said that the newspaper article stated that Mr. Smith might have something to do with Roman Street, is that correct?

A Yes.

Q How sure of you are that statement?

A My friend was the one. He said that he may — he didn't say he — he said look at the pictures and see if I can identify any of those people that's on the list because in the article they was saying that they may have had something to do with the North Roman shooting. That's what he told me. So, I looked at the pictures and I saw his face, and I said, "Yeah. Shit. That's him."

BY MS. KELLY:

Your Honor, can I have permission to approach the witness and let him look at the article?

BY THE COURT:

Sure.

[52]

BY MS. KELLY:

Which has been marked as State's Exhibit C.

Q Mr. Boatner, if you could read through that article and tell me where it states that they had anything to do or were suspects in Roman Street?

BY MS. ANDRIEU:

Object to relevance, Your Honor.

The witness has testified that it was his friend's understanding.

He hasn't testified —

BY THE COURT:

Objection sustained.

That's the way I understand the testimony.

BY MS. KELLY:

Yes.

Q So, can you look at the article and tell me where it mentions anything about the —

BY THE COURT:

Well, what relevance does that have, if it was someone else that told him that?

BY MS. KELLY:

I think that if you read back the testimony, that is not what he said initially.

He said that he read the article. That he still had a copy of it. And that it said that Mr. Smith was a suspect in Roman Street.

If you want to go back to what his testimony was.

BY THE COURT:

Sir, did you read the article?

BY THE WITNESS:

After the fact.

I didn't read the article until — because like I said, I saw the picture and I just immediately just flipped out. I said, "That's him."

I didn't read it right off hand.

BY THE COURT:

[53]

And, it was your friend that brought your attention to this news article?

BY THE WITNESS:

Yes.

He told me to look at the article.

Well, actually not the article. He said to look at the pictures to see if I recognized anybody.

BY THE COURT:

All right.

When you looked at the pictures, did you recognize someone?

BY THE WITNESS:

Juan. That's the only one I recognized.

BY THE COURT:

Did you read the article then?

BY THE WITNESS:

No, not at that time.

BY THE COURT:

All right.

BY MS. KELLY:

Q Do you recall what your friend's name was?

A Yes, I do.

Q Can you state it, please?

A Louis (spelled phonetically)

Q Last name?

A I don't want to say the last name.

BY MS. ANDRIEU:

Objection.

As to relevance.

BY THE COURT:

Objection sustained.

BY THE WITNESS:

Do I have to say his name?

[54]

BY THE COURT:

No, you do not.

BY MS. KELLY:

Excuse me, Your Honor, but he is saying — This is hearsay. I have the right in rebuttal to call his friend to find out exactly what he said to him.

BY THE COURT:

I am not going to permit it.

You can take writs on me if you care to.

BY MS. KELLY:

Okay.

I may or may not.

I'll just note an objection for the record.

BY THE COURT:

Your objection is noted for the record.

BY MS. KELLY:

I'll tender the witness.

BY THE COURT:

All right.

RE-REDIRECT EXAMINATION

BY MS. ANDRIEU:

Q Mr. Boatner, did your friend's having suggested that you look at this photograph influence you in any way?

A No.

Louis, he called me and told me, "Why don't you go get the newspaper and check it out and see if you recognize anybody." Because he said in the article that the article said that they may have been involved in it. That's all that he told me.

So, I got off the phone, went to the store, and bought the newspaper.

Q Okay.

[55]

BY MS. ANDRIEU:

No further questions, Your Honor.

BY THE COURT:

All right.

RE-RECROSS EXAMINATION

BY MS. KELLY:

Q Okay.

And, so just to clarify, you bought the newspaper when it was suggested?

BY MS. ANDRIEU:

Objection. Asked and answered.

BY THE COURT:

Well, he has testified that his friend called him on the phone, which is of no moment at all in the identification processes.

He went and bought a newspaper and he saw the newspaper and he identified Mr. Juan Smith.

BY MS. KELLY:

Yes.

I want to clarify the timing because he has made several different statements on whether initially he told me he didn't see the newspaper prior to Charity Hospital identification, which is June 28th.

He now just said that he bought the newspaper the day it was out, which means that he saw it prior to that.

BY THE COURT:

I think that if you look at the language that is used, there is a difference in looking at the photograph and reading the article.

BY MS. KELLY:

Well, when we get the transcripts — I just want to clarify.

[56]

BY THE COURT:

You can look at that.

If you care to, you can point it out to me, if you care to.

BY MS. KELLY:

Okay.

I just wanted to clarify that.

BY THE COURT:

I am listening.

I understand.

BY MS. KELLY:

Q That thinking back it is now what you recall the best that you saw the newspaper the day it came out? I just want to clarify that that is correct?

A Yes.

Q Okay.

A I saw the photos. I didn't read the article.

* * * * *

TESTIMONY OF TRINIEZE SMITH

* * * * *

[61]

Q Okay.

After having read the transcript that is filed with the Louisiana Supreme Court, do you remember having testified that you thought your brother went by "Short Dog"?

A No.

What I said was "I think so" when that question was aksed.

* * * * *

[62]

BY MS. ANDRIEU:

Q When you testified in your brother's trial and you said that you though he was called "Short Dog", were you lying?

A No.

* * * * *

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

Transcript in the Above entitled Matter, as Heard Before the Honorable Frank A. Marullo, Jr., Judge Presiding, Under Date of January 22, 2009

Appearances:

Donna Andrieu, Esq. **Alyson Grangnard, Esq.**	**Counsel For The State** **Assistant District Attorney**
Kathy Kelly, Esq. **Kristen Stanley, Esq.**	**Counsel For The Defense**

* * * * *

TESTIMONY OF DETECTIVE JOHN RONQUILLO

* * * * *

[6]

And, did you speak to any of the other surviving victims of the house that evening?

A Yes.

Q And, could you — Do you recall who you spoke to?

A Yes.

Larry Boatner and Rebby Espadron (spelled phonetically).

Q Okay.

[7]

And, do you recall if Mr. Boatner told you how many assailants entered the home on the first interview?

A On the first interview, he remembered three, but he thought there was probably four because Phillip Young was not in the house at the time that the individuals entered the home.

Do you understand?

Larry Boatner, he figured, or he told me that Phillip Young had to be one of the people that were involved in coming into the home because he was not in the residence when the men came into the house. He didn't know the guy.

Q Okay.

A Okay.

Q And, but all together, do you recall how many people he said entered the home?

A I think he remembered three entering. Yes.

Q Okay.

And can you recall anything else he told you about what happened?

A They forced him down. They demanded money. He was hit in the head with a chrome plated automatic pistol. He fell on the ground, and he waited to be shot and killed when the gunfire erupted.

Q Okay.

And, do you recall the weapon he described — I'm sorry. Let me ask you first.

Do you know if he ever identified the person who hit him in the head?

A Yes.

Q And, can you remember who that was?

A Yes.

Q And, —

A Juan Smith.

Q Okay.

And, do you recall the weapon he described the man he identified as Mr. Juan Smith was carrying?

A I believe it was a silver or chrome plated automatic weapon, automatic [8] pistol, I should say.

Q Okay.

And, do you recall if he gave you any description of the guns of the other men?

A Yes.

One he said was a nine-millimeter Uzi-type weapon and one was an AKA forty-seven, which was an assault type rifle.

Q Okay.

And, at the hearing Mr. Boatner testified he told the police that Mr. Smith was carrying a nine-millimeter weapon and that none of the other assailants were carrying a nine-millimeter weapon.

Is that —

BY MS. ANDRIEU:

Objection, Your Honor.

Leading.

BY THE COURT:

Stop leading your witness.

BY MS. KELLY:

Q Well, did he ever tell you Mr. Smith was carrying a nine-millimeter?

BY MS. ANDRIEU:

Objection, Your Honor.

Leading.

BY THE COURT:

Well, I am going to let him answer.

Do you recall that, Mr. Ronquillo?

BY THE WITNESS:

He said that he was carrying an automatic. This is what I remember, an automatic, a chrome plated automatic handgun, a pistol.

BY MS. KELLY:

Okay.

Q And, I believe, just to clarify, you testified that he said another man was carrying a nine tech? Is that what you said?

[9]

A Yes, an Uzi-type nine tech, yes.

Q Okay.

And, do you recall if Mr. Boatner ever gave you any physical description as far as height and weight of the man that he identified as Juan Smith?

He gave a description to Detective Archie Kaufman (spelled phonetically).

Mr. Boatner was transported from the scene to the Homicide Division office and a typewritten statement was rendered at that time. And, Mr. Boatner described him as being sort of a brown skinned black man with a lot of gold in his mouth with a short — they used to call it a flat top haircut at the time.

Q Did he describe height or weight?

A That I can't remember.

I tend to want to say yes, but I really can't remember. It has been thirteen years now.

Q Okay.

BY MS. KELLY:

Your honor, if I could show just — approach the bench and show Detective Ronquillo his trial testimony, if I might.

Okay.

Q Now, I am going to show you your testimony at the trial.

A. Okay.

Q And, if you could look at page 115.

A Sure.

Q And, if you go to starting at paragraph twenty.

A Okay.

Q If you read that, does that refresh your memory about what he told you about height and weight?

A One thing that you have to keep in mind about Mr. Boatner, I was communicating with Mr. Boatner probably for about at least a good month. And, over the course of our communications he would supply different things.

Like one time, he mentioned that Juan Smith was kind of a short and stocky guy. He mentioned dark skin. And, as we progressed through the [10] identification process, he — But, I don't remember questioning him. The question asked was do I remember if it was in Archie Kaufman's statement, and I don't remember if he mentioned it in Archie Kaufman's statement — Detective Kaufman's statement.

Q Okay.

A But, during the course of our meetings and different things, he did tell me that he was sort of a fit guy. That's the word, kind of a stocky fit guy.

Q Okay.

And, when you are looking at your testimony under oath, you were asked if he told you how tall, and you said, "No, he didn't tell me that."

A Well, this is when we were talking, I think, about on the scene, right?

Q Right.

A Well, I —

Q That is what I am asking about.

A Oh, just on the scene. Oh, no, no.

I thought that you were talking about throughout the course of the whole investigation.

On the scene, no, he did not.

Q Prior to today, did you get a chance to look at your interview notes?

A Which interview notes?

Q I believe the ones — the State has stipulated that the dailies and handwritten notes —

A I had some things, yes.

I don't know what you are talking about in particular, though.

Q Okay.

BY MS. KELLY:

If I could approach the witness, Your Honor?

BY THE COURT:

Sure.

BY MS. KELLY:

And, show him petitioner's — what has previously been admitted as petitioner's exhibit two?

[11]

BY THE COURT:

Yes.

BY MS. KELLY:

Q Okay.

A Okay.

What in particular are you talking about?

Q This is in globo, and I think that the State previously stipulated that you looked at these and said that they were your notes other than an interview that was done with Dale Miller (spelled phonetically).

A I think this was the page that I stipulated to right here.

BY MS. ANDRIEU:

Your Honor, with regards to the State's stipulation, at the time Detective Ronquillo was not slated to testify. And, we stipulated, and that it may have been inappropriately — that these — that exhibit two are all Detective Ronquillo's notes.

In fact, in an abundance of caution, we asked — we are going to ask that the Detective look at the notes to make sure that they are, in fact, all of his.

In other words, there are handwritten notes. Earlier it was the State's understanding —

BY THE COURT:

We have had this discussion before.

BY MS. ANDRIEU:

Yes, Your Honor.

BY THE COURT:

So, let's find out who is the author of the notes that we have before he testifies to them.

BY MS. ANDRIEU:

Yes, Your Honor.

BY THE COURT:

And, if they are his. If they are not his, he can't testify to them.

BY MS. KELLY:

[12]

Okay.

Your Honor, I am going to object to the fact that the State previously told me he looked at all of these.

BY THE COURT:

Okay.

But the State is not ruling in this case, and I am saying that I want to know if the notes are not his

and he is not the author of them then he is not going to testify to them.

Period.

BY MS. KELLY:

Okay.

So, —

BY THE COURT:

Your objection is noted.

Move on.

BY MS. KELLY:

Okay.

Q I believe my question was —

BY THE COURT:

I said move on.

BY MS. KELLY:

I am.

Q My previous question to Detective Ronquillo was if you had a chance to review these notes prior to your testimony?

A Some of these are not my notes. That is one thing. Some of these are my notes and some are not my notes.

I reviewed some of these.

I don't know if I reviewed the notes of — I'd have to go through and read every one of these.

You have notes in here that are from assisting detectives on the scene apart from myself. And,

I am not sure if I went through all of these in detail.

But, I probably — if you want to take the time for me to read through all [13] of this —

BY THE COURT:

Yes.

I would like to take the time for you to read through those and determine whether they are your notes or not.

BY THE WITNESS:

Well, some of them I know are definitely some of my notes, Judge.

BY THE COURT:

Some of them are yours?

BY THE WITNESS:

Yes.

There is no disputing that some of these are my notes, but some of them are not.

BY THE COURT:

I want you to be able to testify from your notes but not somebody else's notes.

BY THE WITNESS:

Yes, Judge.

The notes that are in here, there are some that are my notes and some that are not my notes. And, —

BY THE COURT:

Give the detective a minute to go ahead and look at those notes.

BY THE WITNESS:

Some are what we used to call the major offense report form which were completed by other detectives.

It is not all of my work product. Some is and some is not.

BY THE COURT:

Detective Ronquillo, I am going to give you some time to just look over your notes.

Go ahead and look over your notes.

Take your time.

BY THE WITNESS:

[14]

Yes, sir.

BY THE COURT:

And, during that interval if I can move anybody in the courtroom, I will do that now.

****

OTHER MATTERS ARE HANDLED BY THE COURT.

****

BY THE COURT:

Are we ready to proceed?

BY THE WITNESS:

Yes, Judge, I know which ones are mine.

BY THE COURT:

Okay.

Let's go back to Juan Smith.

BY MS. KELLY:

Okay.

Q Now, Detective Ronquillo, that you have had a chance to review the notes, on the interviews with Mr. Boatner, were those yours or were there any other officers involved?

A I was gleaning my notes.

BY MS. ANDRIEU:

Your Honor, the State would ask that Ms. Kelly or the witness refer to the specific page so that the record can be clear?

BY THE WITNESS:

I can show you my interviews with Mr. Boatner that are in here.

BY MS. KELLY:

Yeah.

Q If you could just refer to what page number?

A Well, there is one that is dated, I believe 3/6/95, at 2:30 p.m.

Q Okay.

And, the bottom there are page numbers at the bottom. Can you refer to what page number?

[15]

A Three.

Q Okay.

And, you say that this one is yours?

A Yes, this is mine, yes.

Q Okay.

And, any of the other interviews with Mr. Boatner that are not yours or that you can say are yours?

A Well, there are notations and notes here, I believe, when he was shown lineups.

I apologize, Judge, I thought you just wanted me to read my notes.

BY THE COURT:

That's all right.

BY THE WITNESS:

They are not in any type of order.

That's a problem.

I am assuming, Ms. Kelly, and I am just kind of doing this quickly.

I really don't see anything else.

If you have something in particular, let me know because it would save a lot of time.

BY MS. KELLY:

Okay.

BY THE WITNESS:

There are many other notes in here, and they might have a reference to Larry Boatner.

BY MS. KELLY:

All right.

Q I'll ask you about different statements and show you them, and if it is not yours then you can me.

A Okay.

Good.

Q Okay.

As you are looking through the notes, do you see anywhere where you [16] put down a description of any height or weight?

A No, probably not, no.

Q Okay.

And, if you can look at page three that you referred to?

A Yes.

Q Okay.

I'm sorry.

Let me get to that later.

I am going to ask you a few other questions. Something else first.

A Okay.

Q Okay.

We'll get back to that.

A Okay.

Q As far as a supplemental police report, —

A Okay.

Q — that was done in the case, and that is part of petitioner's exhibit one.

Who prepared the supplemental police reports in Mr. Smith's case? Do you recall?

A Yes. Me.

Q Okay.

So, the information in that, that you prepared and put in, and I just wanted to clarify that before I questioned you about anything in that.

A There is a supplemental report, and supplemental reports were done by me. Yes.

Q Okay.

All right.

I am going to ask you next about if Mr. — if you recall Mr. Boatner ever telling you he saw Mr. Smith's picture in the newspaper?

A Yes.

Q Okay.

And, do you recall what date he told you he saw the photograph?

[17]

A What date he saw the photograph?

Q Yes.

A I believe it was in the June forth, 1995 Times Picayune.

Q Okay.

And, do you recall speaking to Reba Espadron on June the tenth, 1995?

A Yes.

Q And, do you recall what she told you in that interview?

A Yes.

She said that she had spoken to Larry Boatner and Larry had informed her that the person who came in — the first one that came through the door and hit him in the head with the gun the night of the murders was in the newspaper. The picture photograph was in the newspaper.

Q Okay.

A He identified him.

A Okay.

A That's loosely remembering what she said.

Q And, do you recall if she told you when was the last time that she had spoken to Mr. Boatner when you talked to her on June the tenth?

A I believe — I developed the lineups and I went—humm-It was probably about a week before he was supposed to meet us at Ms. Espadron's house. And, he didn't show up. And, I think it was probably — she had spoken to him probably before that.

Q Okay.

A Because I had spoken to her on the tenth, and she only made mention that she had spoken to him and he said that he had identified someone from the newspaper.

Q Okay.

BY MS. KELLY:

At this time, Your Honor, I would like to approach with this and have Officer Ronquillo look at his supplemental police report.

BY THE COURT:

Go ahead.

[18]

BY MS. KELLY:

Here.

BY THE COURT:

I don't have a copy, but I am taking notes as you are going through this.

BY MS. KELLY:

We will give you another copy of that, Your Honor.

BY THE COURT:

Thank you.

That would make it easier for me.

BY MS. KELLY:

It is in the packet —

BY MS. ANDRIEU:

And, Your Honor, —

BY THE COURT:

All right.

I have a copy.

BY MS. ANDRIEU:

Your Honor, before the witness is shown an exhibit, if the State could receive the courtesy of seeing it first?

BY MS. KELLY:

I'm sorry.

It was previously introduced.

BY THE COURT:

I know, but still the protocol is that anything that you are going to show to a witness you should show it to the State first.

BY MS. KELLY:

Okay.

BY THE COURT:

Now, what is the exhibit that you are showing to him?

BY MS. KELLY:

This was previously admitted, petitioner's exhibit one, which is [19] the D.A.'s statements, in globo, at page thirty-seven eighty-three.

BY THE COURT:

Okay.

BY MS. KELLY:

Q Okay.

Officer Ronquillo, if you could identify at the top what page thirty-seven eighty-three says?

A Thirty-seven, eighty-three. It says, "New Orleans Police Department Homicide Division

Continuation Sheet, page seventy-six of eighty-three".

Q Okay.

And, if you can look at the next to last paragraph.

A Okay.

Q Okay.

And, read where it — You can read that to yourself. See if that refreshes your memory.

A All right.

****

THE WITNESS READS THE EXHIBIT.

****

BY THE WITNESS:

Okay.

BY MS. KELLY:

Q Okay.

I believe my last question was do you know if she told you when was the last time she spoke to Mr. Boatner on June the tenth.

A It says here on June the fourth.

Q Okay.

And, one other question.

Were you aware that this newspaper article didn't appear until June the seventh?

A No, I didn't.

[20]

I was out of town between June fourth for a week.

Q Okay.

A I don't know if I had ever seen the newspaper article.

Q Okay.

Did Mr. Boatner ever tell you that any of his friends had told him about the newspaper photograph?

A He didn't tell me that. Not that I can recall.

Q Okay.

And, do you recall on what date Mr. Smith became a suspect in the Roman Street shootings?

A An exact date, no, I can't. I can kind of give you a summation of how this came about.

Robert Trackling was arrested with Mr. Smith and another person in conjunction with another crime. He, Trackling, Robert Trackling, told an inmate at Orleans Parish Prison that Juan Smith was involved in the Roman Street murders and pretty much chronicled in detail what we had learned through the course of the investigation.

Trackling, this was all done by another detective, Byron Adams (spelled phonetically), who was working on the homicide which happened on — a triple homicide which happened out on Morrison Road.

He eventually — it was learned that talking to Trackling that Trackling was involved in that particular homicide also with Mr. Smith and Kintad Phillips and Danielle Bannister.

And all of that came to fruition and then Juan Smith was determined to be a suspect in this particular case, the Roman Street case.

In particular, the exact date, I can look through here and try to see.

Obviously it was — when did we make the lineup with him? I made the lineup with him on June the second. So, I know that at least on June the second he had to be a suspect in this particular homicide.

Q Okay.

A Because Trackling — let's see. Trackling —

Q I think that if you look at — let me see in the record —

[21]

Well, I think, you know, the questions I am asking you, we will get to that later.

I can just specify that it was after a time that Trackling was arrested?

A Yes. Yes.

Q And, that you got that information from Byron Adams?

A Correct.

Q Okay.

And, before June — from that period up until June the 28th, when Mr. Boatner made his identification, was the information that Mr. Smith was a suspect in Roman Street made public?

A It wasn't made public by me.

BY THE COURT:

All right.

So, Byron Adams had gotten this information from an inmate in the Parish Prison that talked to Trackling and Trackling said that Juan Smith was involved in the case, is that what happened?

Is that right?

BY THE WITNESS:

No, Judge, let me explain it.

Actually Byron Adams ended up talking to the inmate, Eric Rogers.

He then —

BY THE COURT:

He did talk to the inmate?

BY THE WITNESS:

Yes.

I eventually talked to Trackling, but at that time Trackling had counsel and he wouldn't talk to me.

* * * * *

[25]

BY MS. KELLY:

Okay.

Q Do you know what date Mr. Boatner made his identification of Mr. Smith?

A I believe it was June the 28th of 1995.

* * * * *

[26]

* * * * *

Q Okay.

Now, prior to June the 28th, do you recall if Mr. Boatner ever told you that he was too scared to look at anyone and wouldn't be able to identify them?

A At one point during the course of the investigation, he — now this was after the night — The night of the incident, he gave a description to Detective Kaufman and said that he could only make an identification and give a description of the first person through the door.

I talked to him — it was like that was the first morning. The morning of the second — on the sixth, I called him to talk to Mr. Boatner. At that time, he told me he couldn't identify anyone. And to me, that was his not wanting to be involved in this case anymore. Because on the night of the incident he said that he could and he gave a description that was very close to Mr. Smith's description that particular night.

[27]

Q Okay.

Do you still have — I'm sorry. You have a copy of petitioner's exhibit two, your notes.

A Okay.

Yes, I have that.

Q Okay.

Oh, I'm sorry.

We are going to go to Exhibit One, which is the supplemental police report.

A Okay.

Q I'll show counsel.

At page thirty-seven, twenty-nine.

A Thirty-seven, twenty-nine.

Q Okay.

A Okay.

Q And, if you could look and identify what this report is at the top?

A Okay. Thirty-seven, twenty-nine.

Q Right.

Could you read the very first paragraph?

A Sure.

"Boatner described the gun as being one AK type assault rifle, one tech nine type handgun, a silver color handgun. Boatner could not supply any additional information on the weapons or supply descriptions of the perpetrators other than they were black males.

Q Okay.

And, you are the one that you stated prepared this report?

A That's correct.

Q Okay.

So, that night he did say that he couldn't give another description?

A That's what he told me on the scene, but he changed. When he gave his typewritten formal statement, he said that he could.

Q Okay.

[28]

And, you already stated —

BY THE COURT:

This is at the scene. He said two different things?

BY THE WITNESS:

No.

At the scene he said that he — He just supplied the description of the perpetrators other than that were black males.

Keep in mind at that point that he was in the home and there were dead bodies everywhere.

At that point, I think that he was a little shook up. He was then transported to the Homicide Division office where he gave a formal statement.

When he gave the formal statement, he gave a description which is very close to Mr. Smith, especially with the haircut and the golds and the skin color. And, that particular night, he emphasized that

he could only describe and identify the first person that came through the door.

BY MS. KELLY:

Okay.

Q And, I understanding — and I am just going to ask you on some of the other statements.

You have already stated that this one, he couldn't give any other information?

A That's correct.

Q Then if you could look at page forty-two, eighty-five.

A Forty-two, eighty-five.

Okay.

BY THE COURT:

That is the D.A.'s —

BY MS. KELLY:

I'm sorry.

That is petitioner's exhibit one.

[29]

BY THE COURT:

Okay.

BY MS. KELLY:

At forty-two, eight-five.

Q And, if you could read what is at the top?

And, if you could identify what this is?

A Yes, this is a statement of Larry Boatner.

Q Okay.

And, could you read the second question?

A "Can you describe the subjects who shot the people in the house?" "I can tell you about one, the one who put the pistol in my face. He was a black male with a low cut, golds in his mouth. I don't know how many. That's all. I was too scared to look at anybody. All of them had guns. One had an AK and one had a tech. And, the one who hit me had a chrome automatic. It was big. I heard the car because it was so loud, the muffler, I knew it needed a muffler. I opened the door, and I see these two guys. One, he throws a gun in my face. The other one walked in behind him. He had the AK. I saw him get out of the car, the third guy, I didn't see the guy. He had a tech nine. It was an Uzi. He was pointing it at me, at everyone on the floor. I was too scared to look at them. They was about my complexion, brown skinned."

Q Okay.

And if you can look now to the same exhibit at page thirty-seven, forty-nine.

A Thirty-seven, forty-nine.

Q And look at — I'll show Ms. Andrieu.

Look at the third paragraph from the bottom.

A Okay.

Q Are you there?

A Yes, I'm there.

Q Can you read that out loud, please?

A It is the same as what is in my notes. He said that he — "I contacted [30] him by telephone." Now, the four p.m. is going to be a long time. Apparently that is a typo because if you look at the next paragraph it says I spoke to Phillip Young's mother at four p.m. I obviously couldn't talk to two people on the telephone at the same time. And, my notes show 2:30. So, it was probably at 2:30 that I spoke to Larry Boatner.

And, Rebby Espadron and both subjects advised Ronquillo that they could not identify any of the perpetrators of the murder.

Q Okay.

Thank you.

And, now I am going to switch to the handwritten notes that you looked at before which is petitioner's exhibit two, at page three.

A Okay.

Q Okay.

And, I believe that you stated before that that was your interview notes, is that correct?

A Well, these are my notes, yes.

Q Yes.

Okay.

And, could you read the text that starts at 2:30 p.m. the second paragraph on the page?

A The second paragraph? The microwave?

Q No, where it says — Are you on page three?

A Yes.

You said the second paragraph?

I have the coroner's report and then I have Larry Boatner —

Q Right where it says, "Larry Boatner."

A Okay.

I thought we had read that already.

"Saw three negro males coming in. Guy on the floor had to be with him, making four guys. When he left, he heard three doors slam, the car with bad muffler drove off. Got up and saw people. Shocked. Could not identify anyone because couldn't see faces. Rebby in back room. Heard Rebby open the door. [31] Don't know Marty (written phonetically). Glance at first BM, which is black male. Saw man through door. Can't tell if he had face's covered. Didn't see anyone. Could identify car if running."

And, then I have twenty-five, which I guess is making a notation to a twenty-five automatic.

Q Okay.

Thank you.

All right.

Now, my next question for you is did Mr. Boatner ever tell you he was not sure how many men were in the house in any of your interviews?

A I remember he said that three came in, and he said that there had to be a four person because Phillip Young was not one of his friends who

were in the house at the time that the men barged into the house.

Q Okay.

I still — I guess I want to make sure that I understand you.

A Okay.

BY MS. ANDRIEU:

Your Honor, this question has been asked and answered.

BY THE COURT:

I think I understand what he has said.

BY MS. KELLY:

Well, I am just trying to understand if he is saying that there were three men in the house and Larry Boatner or was —

BY THE COURT:

He is saying that there was somebody in the house, Mr. Phillips, who was shot in the house and he was not one of the occupants of the house.

BY THE WITNESS:

That is correct, Judge. Yes, sir.

BY MS. KELLY:

Well, I am just trying to clarify.

Q Was he one of the three men that was supposed to be in the house? Or [32] was he saying that there was possibly four men in the house?

A You lost me on that one.

He saw three men come in.

Q Right.

A Three men forced their way in.

After everything was over with, he heard three doors slam. After a while he got up, and he looked at all of his friends, the people that were in the house when the shooting occurred that he knew. He went through the house, and Phillip Young, a fourth individual, he didn't know. And, he said that he must have been one of the perpetrators because he knew at the time that they came in and started shooting that Phillip Young was not in the house at the time.

Q Okay.

A Does that clarify it?

Q Yes.

A Okay.

Q And, the reason I am trying to clarify with you is in his testimony the other day Mr. Boatner stated that he wasn't sure if there were only two men in the house. And, I am trying to clarify if he ever —

BY THE COURT:

What Mr. Boatner said the other day is of no moment right now.

This is what he recalls, not what Mr. Boatner said.

That other testimony is of no moment.

We are here as to what Detective Ronquillo recalls.

BY MS. KELLY:

All right.

Q Then, do you recall him ever telling you that he didn't know that there may have been only two people in the house?

A No.

Q Okay.

Thank you.

Besides Mr. Boatner, were there any other surviving eye witnesses?

A Yes.

[33]

Q Okay.

And, could either of these witnesses identify Mr. Smith?

A No.

Q And, could either of these witnesses give you an kind of physical description of the men that came in?

A You keep using the plural. It was Larry Boatner and Rebby Espadron. They were then only two eye witnesses. Well, that were there at the time of the shooting in the house.

Q Okay.

I was referring to Reginald Harber (spelled phonetically).

A Oh, no, he was actually in the back of the house. He didn't witness anything.

Q Okay.

And, can you recall what description Ms. Espadron gave you?

A She came out. She saw a black male. He like a bandanna covering his mouth. And, basically, that is all that she really remembered.

Q Okay.

And, do you recall Ms. Espadron giving you any physical description or height or weight of the man she saw?

No, not off hand. No.

BY THE COURT:

Let the witness look at his notes.

BY MS. KELLY:

I'm sorry, Your Honor.

I am going to show him an exhibit that I want to introduce.

I am trying to find it.

BY THE COURT:

Show it to the District Attorney.

BY MS. KELLY:

I will.

Okay.

At this time we would like to have marked for the record what is [34] Petitioner's Exhibit Three, which is page thirty-two and thirty-four of the supplemental police report.

Let the record reflect that I am showing it to opposing counsel.

We forgot to put the page in that is in globo.

BY THE COURT:

Is that part of the supplemental report?

BY MS. KELLY:

Yes.

BY THE WITNESS:

Thirty-two and thirty-four?

BY MS. KELLY:

I am getting that page.

BY THE WITNESS:

It is right here. Thirty-two.

BY MS. KELLY:

No. I'm sorry. Thirty-seven, forty-one.

BY THE WITNESS:

Okay.

Okay.

BY MS. KELLY:

Okay.

Q And, if you could look at —

A Obviously she did. I just didn't remember. She said that she was five six —

Q Okay.

A Five-foot six inches tall, a thing around his face, slim build, wearing a jacket and a stocking cap.

Q Okay.

And, did — I believe you stated — Well, let me just ask you if you recall finding either a blue or black bandana at the scene?

A That I don't remember. There was so much stuff on the scene. And, this is actually a statement that she gave to Detective Stewart (spelled [35] phonetically) and not to me.

BY THE COURT:

Again, I would like to indicate to the Defense Attorney that I do not want him to testifying to stuff that he did not do. He is only to testify to what he did.

BY THE WITNESS:

And, that is not mine, Judge.

BY THE COURT:

Ask him only about things he authored.

BY MS. KELLY:

Okay.

Your Honor, I would ask the witness — this is from the supplemental — if he authored the supplemental police report. I asked him and he had stated yes, and so therefore I —

BY THE COURT:

Yes, but the part of the report was not information that he knew. That is information that a third party knew, and I am not going to do that. I want this to be primary. I don't want him to testify to a fact that just was told to him. Get that party here and let him testify to that.

BY MS. KELLY:

All right.

Q Going back —

All right.

At this time, Your Honor, if I could show — approach the witness and show him a copy of his trial testimony to see if that refreshes his memory?

BY THE COURT:

Yes.

BY MS. KELLY:

Here —

BY THE COURT:

[36]

Is that in the trial testimony?

BY MS. KELLY:

Yes.

It is at page eight-seven —

* * * * *

Q Officer Ronquillo, now that you had a chance to review your trial testimony, do you remember anything about a bandana?

A Well, it says here that a black bandana was recovered from the scene.

Q Okay.

And, do you recall if you were ever able to determine who the bandana belonged to?

A No.

Q Okay.

A There were a lot of dead people in the house. You couldn't tell who it belonged to.

Q Okay.

[37]

So, you don't know if it belonged to a victim or it belonged to —

A Well, like I said, most of the victims couldn't talk because they were dead. So, you know, my summation is that it belonged to one of them because it was near their body.

* * * * *

[38]

BY THE WITNESS:

Do you have my written report? It will probably state where the bandana came from.

BY MS. KELLY:

Yes.

We have a police report which is petitioner's exhibit four that we would like to introduce and show to opposing counsel.

BY THE COURT:

[39]

All right.

BY MS. KELLY:

Which is a crime lab report.

* * * * *

COUNSEL VIEWS THE EXHIBIT

* * * * *

BY MS. KELLY:

Okay.

I am going to approach the witness and show him the report.

BY THE WITNESS:

I didn't write this.

BY MS. KELLY:

Okay.

Q If you look at —

A This isn't mine, though.

Q Okay.

This just shows evidence that was found at the scene.

A Right.

BY THE COURT:

Okay.

That is not your report?

BY THE WITNESS:

No, sir, it is not.

BY THE COURT:

Okay.

BY THE WITNESS:

This is actually a crime lab report.

BY THE COURT:

Well, —

BY MS. KELLY:

We will just introduce it into the record.

BY THE COURT:

[40]

Well, he can't testify from something that he didn't prepare.

BY MS. KELLY:

All right.

* * * * *

Q Now, if you could — if you could look at Exhibit Two, the dailies, at page forty-four?

A The dailies?

[41]

Okay.

Q When we had you look before about if these were your notes, could you state whether this is at page forty-four, the interview with Shalita Russell, if that is your interview or someone else's?

A You said page forty-four?

Q Yes.

A This is —

Q Exhibit Two, page forty-four.

A All right.

This is Exhibit Two. Page forty-four is —

Q At the top of the page where it says, "face down perp".

A Yes.

Q Do you know if that is your notes or another officer's notes?

A That's my handwriting.

Q Okay.

So, can you read at the top where it says, "face down perp", and continue reading?

A "Victim number three, lying on hands and wrists, of perpetrator, female face down against cabinets, conscious"

Okay?

Q Continue.

A "Said in kitchen saw people barge in. One black cloth across face. First one through door. No further statement."

Q Okay.

And, was — Do you know who victim number three, who was — that we are referring to here?

A Well, the person that was lying on the hands of Phillip Young was Robert Simons (spelled phonetically).

Q Does it specify a female?

A Ms. Kelly, let me just see. None of this is in order. That's the problem with this. This is not in order. I don't know if this was given to me by someone else because you don't have the

previous page to this. The previous [42] page to this states three, thirteen, ninety-five and – What —

Q Well, I just want to — This is — I just —

* * * * *

BY MS. KELLY:

Q But, you are saying that these are your notes?

A This is my handwriting, yes.

Q And, this is indicating that you did speak to her.

A No, it is not indicating that.

Somebody could have relayed that to me.

I don't have the rest of the notes here to see actually what it is.

My notes, if you know anything about me, I am a rambler. I kind of — how I put things together sometimes, I never know, but this could be given to me by somebody else, but it would say that somewhere else. The previous pages from three thirteen was almost two weeks after the incident. And then you have "face down perp".

BY THE COURT:

So, some of the notes are your reflections of what someone else told you [43] and some —

BY THE WITNESS:

It could be.

But, I — Shalita Russell was gone when I got there. I never remember seeing her.

BY THE COURT:

Okay.

So, you never did talk to Shalita Russell?

BY THE WITNESS:

No.

I think that perhaps somebody —

BY THE COURT:

So, whatever is there is what somebody told him.

Move on.

BY MS. KELLY:

Okay.

Q And, were you aware of any police that did speak to or interview Shalita Russell?

A I think something was done at the thospital.

Q Okay.

If you could look, it might help refresh your memory at exhibit one at thirty-seven, thirty-eight, at the top of the page.

A Thirty-seven, thirty-eight.

Q And, look at the top paragraph.

A Okay.

Q Would that help refresh your memory on who spoke to her?

A See, this is the same.

There is a page missing here. There has to be.

It says here that Mims added that in the interview with Russell — and that is Detective Mims, and that was done at the hospital. She identified the unknown subject shot in the house as one of the perpetrators of the murder. Mims then said that she then lost consciousness.

[44]

Q Okay.

Thank you.

And, do you know who first name or who this Mims would be?

A Michael Mims.

Q Thank you.

A See, this is the same way I got it. That page is missing when I reviewed this. And, if you look at the page before, —

Q Well, I have a complete copy that we can let you see — a complete set of those supplemental police report. For the exhibits, we only pulled out what we would need.

A Oh, okay. That's with Mims. He talked with her at the hospital.

Q That would be Michael Mims, then?

A Yes.

Q Okay.

Okay.

Do you recall who Mr. Boatner said was the first man in the house?

A The first person was Juan Smith.

* * * * *

[47]

* * * * *

Q Officer, — Detective Ronquillo, on the exhibit two the dailies at page fifty-six, if you could go to that.

A Ms. Kelly, I'm sorry, but what page?

Q Page fifty-six, which is —

A Page fifty-six?

Q Right.

A Of which one?

Q Exhibit Two.

A Two.

Okay.

Q That is marked as "dailies".

A All right.

[48]

Q Did you get a chance to look at this page and identify whether this is your notes or someone else's?

A Yes.

Q And, can you say which it is?

A Yes.

It is my handwriting.

Q Okay.

And, if you could look at the second half of the page at two, ten?

A Okay.

Q Were you able to review this previously?

A Yes.

Q Okay.

And, so I want to ask you, do you recall going to the hospital and interviewing Phillip Young?

A If you want to call it an interview, yes.

Q Okay.

And, can you explain what happened on your visit with him?

A Basically he was confined to an extended care facility because of the gunshot wound he sustained. He was incapacitated to a large extent. He was strapped in a wheelchair because he couldn't sit up on his own. And, he had some very minor use of his left hand. He really —

BY THE COURT:

Could he communicate with you?

BY THE WITNESS:

He couldn't talk. And, that's the whole question of this whole deal is that when I went there to talk to him, after I left I never had hide nor hair actually of what he said or what he was talking about.

He — It was so jumbled and so I can't explain it. It was just — it didn't make any sense to me a lot of it.

BY THE COURT:

Could he say words?

BY THE WITNESS:

[49]

He would kind of move his head, and no, he couldn't talk. He couldn't talk. And, yes and no, and he would try to do things like that. And, a lot of it, he wouldn't even answer. He would just kind of sit there and he would look. And, he didn't say anything.

I would ask him some questions, and I wasn't really sure if he was affirmative or negative, and I'd ask him to do it again, and he wouldn't do it.

And, he kind of like acted like he was nodding off like he was sleeping. It was not anything that I thought had any substance or — The only things that he appeared to be positive of was before he knew that I was from the Homicide Division, and when I asked him questions about his general health. He seemed to be affirmative in his responses the, but after he found out — I could distinguish between yes and no, and then after that — I wrote notes here, and I am really not sure what his — what he was actually saying.

The whole thing was — after he found out that I was from the Homicide Division, the whole nature of his behavior and how he answered questions changed.

BY MS. KELLY:

Okay.

Q Now, in your notes your indicate that he shook his head. You have no, that didn't shoot me; and

no — and then it has a paragraph that has Short Dog/Buckle (spelled phonetically)/Fats (written phonetically)?

A Right.

Q And, then next to it, it says, "No, didn't shoot me." And then underneath that it says, "No, not with me when went to house."

A Right.

Q Okay.

So, first, my first question would be where he got the names of Short Dog, Buckle and Fats?

A Well, most of those were nicknames that belonged to some of the suspects in this particular case.

[50]

Q Okay

And, prior to talking to Byron Adams, where you aware of Fats or Buckle being street names for anyone?

A I knew both of the individuals. And, I knew that Danielle Bannister was Fats. I wasn't familiar with Buckle being associated with Kintad Phillips, no.

Q Okay.

And, prior to talking to Byron Adams, had you — did you know that Mr. — had any information that Mr. Smith was referred to as Short Dog?

A No.

Q Okay.

And, then on the next question, it is got a yes on that he — that one of the people in the house shot him, is that correct?

A That's what it says.

But, like I was saying, when I was writing these things down, I wasn't quite sure exactly — Well, that's why I kind of disavowed this whole thing because I really wasn't sure about his answers.

And, if you note in my report, it only makes mention of the health issues because I really wasn't quite sure about this.

That's the problem with notes. I mean, there are different things that a guy does with his notes. You might interpret it as one way, and I know what I wrote down and I know what it means to me.

Q Okay.

But, on the question where it is "yes, one of the people in the house shot me", was that actually correct?

A I don't know. That is what I am telling you. I wrote down what I thought he said, but I am really not sure. He —

Q Well, I am asking you —

BY MS. ANDRIEU:

Asked and answered, Judge.

BY MS. KELLY:

I am asking a completely different —

[51]

BY THE COURT:

I think he has answered the question.

He said that the person didn't articulate. He couldn't speak. And, he has said that he is not sure, but he wrote these notes to himself, but he is not sure what was communicated in this interview.

BY MS. KELLY:

Okay.

BY THE COURT:

Is that correct?

BY THE WITNESS:

Yes, sir.

BY MS. KELLY:

I might have not put it correctly.

BY THE COURT:

I think you put it correctly and he answered it.

BY MS. KELLY:

No.

I mean it is a different question.

Q I want to ask you was Phillip Young —

BY THE COURT:

Don't make it the same question in different words.

BY MS. KELLY:

It is not the same question.

Q Do you know who Phillip Young actually was shot by?

A No.

Q Okay.

Now, let's see.

Now, prior to Byron Adams calling you, had you in your own investigation ever found Mr. Smith being known as a known associate of Kintad Phillips or Danielle Bannister?

A I wasn't really all that familiar with Mr. Smith.

Q Okay.

[52]

And, had Kintad Phillips —

A I knew of Mr. Smith, but I had never — he was never part of any investigation on my part.

Q Okay.

And, you knew of him independently of Byron Adams?

A Yes.

I mean, when you work in the Homicide Division you learn a lot of different names and lot of different people.

Q Okay.

A You know.

Q And, had Kintad Phillips or Danielle Bannister been suspects in this case?

A Yes.

Q Okay.

And, prior to June the 28th had you shown several other lineups to Reba Espadron and Larry Boatner?

A Prior to June the 28th?

Q Yes.

A Yes.

I showed prior to June the 28th, I had show I believe fifteen — fourteen, fourteen to Reba Espadron and on the 28th — up to the 28th, I had shown — Because I made one of Phillip Young, which I never showed to Ms. Espadron or Larry Boatner. So, I believe there were fourteen or fifteen total lineups.

Q Okay.

A That were assembled for presentation to these two people.

Q Okay.

And, did these lineups contain known associates of Kintad Phillips or Danielle Bannister?

A The — Well, there was a lineup that contained Kintad Phillips and Danielle Bannister and another subject, because they were grouped as suspects in another murder.

Q Okay.

And, —

[53]

A Not one of my investigations, but from another murder. I got information from another detective.

Q Okay.

And, on the other lineups, were other people shown that you knew were known associates of theirs?

A Not all of the lineups, no. There were different ones.

BY THE COURT:

What is the relevance of this?

BY MS. KELLY:

My next question is —

BY THE COURT:

Well, let's just ask relevant questions.

BY MS. KELLY:

Q The relevant question was in all of those lineups was Mr. Smith's photograph ever previously shown?

BY THE COURT:

If you know.

BY MS. KELLY:

If you know.

BY THE WITNESS:

Shown by who?

BY MS. KELLY:

Q Shown to Mr. Boatner prior to June the 28th?

A Prior to me showing him in a lineup, no.

Q Okay.

Now, as you previously testified that you had gotten information that Eric Rogers (spelled phonetically) had told Byron Adams that Mr. Trackling had confessed to participating in the Roman Street murders, is that correct?

BY MS. ANDRIEU:

Objection.

BY THE COURT:

We have already gone over that.

[54]

BY MS. ANDRIEU:

And, leading.

BY THE COURT:

This is becoming repetitive.

I already discussed that. And, I asked him about that.

So, why are we talking about it again?

I got the information.

BY MS. KELLY:

Okay.

I'll move on, Your Honor.

* * * * *

[62]

* * * * *

BY MS. ANDRIEU:

Q Good morning, Detective Ronquillo.

Donna Andrieu on behalf of the State.

First of all to just clear up some terminology that is being used.

Can you define for the Court what a police daily is?

A A police daily was something that was generated in our office. I believe it was generated throughout the detective bureau, whether the districts used this format or not. But say for instance you're a witness in a case and I would go interview you on a specific date and time. When I would come back, I would generate paperwork, which would be forwarded throughout the office, which would eventually end up in the hands of the Chief of Detectives so he could keep tabs of what was going on in the case.

[63]

Q Okay.

And, would you describe them as an interoffice —

A Yes, ma'am. It is an interoffice correspondence. That is exactly right.

Q Are the dailies meant to be published in —

A They are meant to be spread through our office and kept in our office, yes, ma'am.

Q Thank you.

And, have any of the exhibits that you have seen today — are any of the exhibits that you saw today dailies?

A Not that I can recall, but I will look again.

BY MS. ANDRIEU:

Your Honor, at this time I would —

BY MS. KELLY:

I am going to object on the grounds that when we had a Court Order to the NOPD to turn over the dailies. And, it was the New Orleans Police Department that labeled this information as being dailies.

BY MS. ANDRIEU:

And, Your Honor, —

BY THE WITNESS:

Did you get that from people in our office or did you get that from the record room?

The record room doesn't know the first thing about what we do in the homicide division.

BY MS. ANDRIEU:

Okay.

BY THE COURT:

Go ahead.

Ask the question.

BY MS. ANDRIEU:

And, Your Honor, just in response to her objection, as well as to the clarification of the record, there were a number of items that [64] were requested from NOPD. There was a no packet of documents that were labeled "dailies". So, are any of th documents that you saw today police dailies?

BY THE WITNESS:

No.

BY MS. ANDRIEU:

Q Okay.

Let's talk about your notes.

You've seen various notes today. Were those notes taken necessarily as you were speaking to a witness?

A Yes.

Q Okay.

A Some of them.

Q Okay.

Can you tell the Court were some of the notes that you took taken after having spoken to a witness?

A Yes.

Q Were any of the notes that you saw taken before you spoke to a witness?

A I'm not following that one.

A lot of times before I talk to someone, I may preface things or prepare things like write questions and do different things that would be in my notes before I spoke to someone. If that is what you are asking me.

BY THE COURT:

You made notes to yourself?

BY THE WITNESS:

Yes.

BY THE COURT:

Okay.

BY MS. ANDRIEU:

And that was my question.

BY THE WITNESS:

If you go through there, I have pages of things that I need to do, questions [65] I should ask. When I used to do statements, before I would sit down with the statement, I would sit down in my own mind and write out the questions before I'd do that.

BY MS. ANDRIEU:

Q And, were those notes meant to be turned over to a supervisor? Or why did you take the notes? Who were they meant to be seen by?

A They were meant to help me. They were meant to help me with my investigation.

Q Okay.

Okay.

Let's talk about Phillip Young, was Phillip Young shot in the house on North Roman Street?

A Yes.

Q And, was it your job to determine who shot Phillip Young?

A No.

Q And, in fact, was it your job to analyze ballistics to determine from what gun the bullet that shot Phillip Young was fired from?

A Ballistics were done on all of the ammunition that was recovered from the house.

Q Okay.

Okay.

Your interview with Phillip Young, when you say Phillip Young couldn't talk, do you, in fact, know that Phillip Young couldn't talk or did Phillip Young just not talk to you?

A Well, there was a nurse that actually introduced me to Phillip Young, Ms. Barbara Riley (spelled phonetically). And, when I came in, I requested to speak to Phillip Young. She told me that he could do certain things. And, she said, "He can talk, but he tends to only talk to his family and to the black aides." She said, "He doesn't talk to me. And, he only talks to the people that he wants to talk to."

Q Okay.

And, in fact, did he talk to you?

[66]

A No.

* * * * *

If Phillip Young had provided you with information, the substance of which you were confident in, okay? You were confident of what he was trying to communicate to you and you were confident in your understanding of it, would you have included that in your supplemental report?

A I'll answer it the same as I did before. As I mentioned, the only thing that I felt confident about was the questions that I had asked him — and that was before he knew that I was from the Homicide Division, — I had asked him general health questions and you know, I guess, just regular questions about him, his health and things of that nature. And, he seemed to be very responsive to that. And after he found out I was from the Homicide Division, that's when it became hard to me to determine exactly what he was communicating. That is why only the health part was included in my report.

* * * * *

[67]

Q Did you enter the house on North Roman Street after the multiple murder?

A Yes.

Q And approximately — at approximately what time did you enter the home?

A 8:30, I guess. Maybe 8:45.

Q Okay.

And, at 8:45 did you see the man that we now know as Phillip Young in the house?

[68]

A I think at that time that he had already been transported.

Q Okay.

Thank you.

Did — Okay.

A If I am allowed to say it, I was advised by the first police officers on the scene and also from Larry Boatner that he did not have his face covered.

* * * * *

[70]

* * * * *

Q Earlier on direct examination you read from page thrity-three of your eighty-three page supplemental report. You read a description. Maybe you — You read a description that Rebby Espadron provided to somebody.

A Right.

Q And, you read — I'll have you read it again.

Would you just ready it to yourself, but read the description.

A Yes.

Espadron described the only perpetrator she saw as being five foot six inches tall, thing around his face, slim build, and wearing a jacket and stocking cap.

Q Okay.

And, at the time that you saw Juan Smith, would you say that Mr. Smith was fixe six, slim build?

A No.

Q Is that a fair description of Juan Smith?

A No.

He is definitely not a slim build. No.

Q Okay.

And at the time that you first saw him, he is in Court today so we can look at his height and weight today, but at the time you first saw him, would that have been a fair description of him?

A Yes.

His hair is different, obviously.

BY THE COURT:

Who described him as being thick?

BY THE WITNESS:

Larry Boatner.

* * * * *

REDIRECT EXAMINATION

[71]

BY MS. KELLY:

Q Could you tell us who interviewed a witness Dale Mims (written phonetically)?

BY MS. ANDRIEU:

Your Honor, —

Withdraw that.

BY THE COURT:

Say the name again.

BY MS. KELLY:

Yes. I was asking him if he knew what officer interviewed witness Dale Mims?

BY THE COURT:

Dale Mims?

BY MS. KELLY:

Yes.

BY THE WITNESS:

Okay.

Detective Rumore interviewed Dale Mims at one point, and I interviewed Dale Mims at one time.

BY MS. KELLY:

Q Okay. [72]

And, do you recall what Dale Mims told you?

A Yes.

He was in his house. He heard a lot of gunshots at about 8:30. And, he looked out of his window and he saw four men exit the house carrying rifles and having ski masks. He couldn't see any of their faces.

Q Okay.

A They jumped in their car and they drove off.

Q Okay.

All right.

And, if you could please look at —

A Are you interested in what Detective Rumore learned from him?

Q No.

A Okay.

Q I would have to call him as a witness, and hopefully he is here today.

A Okay.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS, SECTION "D"

No. 378-343

STATE OF LOUISIANA

v.

JUAN SMITH

Transcript in the Above entitled Matter, as Heard Before the Honorable Frank A. Marullo, Jr., Judge Presiding, Under Date of February 2, 2009

Appearances:

Donna Andrieu, Esq. Alyson Grangnard, Esq.	Counsel For The State Assistant District Attorney
Kathy Kelly, Esq. Kristen Stanley, Esq.	Counsel For The Defense

* * * * *

[13]

BY THE COURT:

All right.

Are you ready to argue your case?

BY MS. KELLEY:

Yes, Your Honor.

BY MS. ANDRIEU:

Yes, Your Honor.

BY THE COURT:

Can I have a copy of the petition so I can follow the argument?

I want it to be done by the petition.

All right.

Let's begin.

***

MS. KATHY KELLY MADE AN ARGUMENT ON BEHALF OF THE DEFENDANT, JUAN SMITH, DURING WHICH TIME NO OBJECTIONS WERE MADE OR NOTED, BUT THE FOLLOWING EXCHANGE TOOK PLACE:

***

BY THE COURT:

I think in Ronquillo's testimony he talked about there were two phases where he shook his head. He shook his head in reference to physical questions about him physically, but when it got to questions in regard to this incident, he did not shake his head.

BY MS. KELLEY:

Well, that is not documented in his interview.

[14]

BY THE COURT:

What I am saying is that is what Officer Ronquillo testified to.

BY MS. KELLEY:

But, it wasn't —

BY THE COURT:

And, he only was shaking his head when the questions were unrelated to this event.

BY MS. KELLEY:

No, Your Honor. I think that if we get his testimony and I showed him his notes and he acknowledged that he answered yes or no questions to facts on this case.

***

MS. KELLY CONTINUED HER ARGUMENT TO THE COURT, DURING WHICH TIME NO OBJECTIONS WERE MADE OR NOTED.

***

BY THE COURT:

Does the State have that view point?

***

MS. DONNA ANDRIEU MADE AN ARGUMENT ON BEHALF OF THE STATE OF LOUISIANA, DURING WHICH TIME NO OBJECTIONS WERE MADE OR NOTED, BUT THE FOLLOWING EXCHANGE TOOK PLACE:

***

BY THE COURT:

It was a predicate to him asking him more serious questions. He wanted to make sure that he was in a frame of mind or physically able to answer the questions.

That is what I got from him.

***

MS. ANDRIEU CONTINUED HER ARGUMENT TO THE COURT, DURING WHICH TIME THE FOLLOWING EXCHANGE [15] TOOK PLACE:

***

BY THE COURT:

That is my appreciation. That is my appreciation.

Okay.

Go on.

***

MS. KELLY CONTINUED HER ARGUMENT ON BEHALF OF THE DEFENDANT, JUAN SMITH. DURING WHICH TIME NO OBJECTIONS WERE MADE OR NOTED. BUT THE FOLLOWING EXCHANGE TOOK PLACE:

***

BY THE COURT:

I understand that the information that they got from the police in Mississippi, they said that they investigated and they came up with nothing.

***

MS. KELLY CONTINUED HER ARGUMENT ON BEHALF OF THE DEFENDANT, JUAN SMITH,

DURING WHICH TIME NO OBJECTIONS WERE MADE OR NOTED.

***

***

MS. ANDRIEU MADE AN ARGUMENT ON BEHALF OF THE STATE OF LOUISIANA, DURING WHICH TIME THE FOLLOWING OBJECTION WAS MADE:

***

BY MS. ANDRIEU:

— Insofar as Shalita's testimony — Russell's testimony, we have testimony here that she was on the phone She never said that she saw the first person coming in. She did not see — She did not state — Okay. We don't know exactly what she saw, but she never stated that she saw the first individual coming in unmasked putting a gun. The first person that she saw, she [16] perhaps said, — and the State is going to put it that way — was masked —

BY MS. KELLEY:

I am going to object. Because, that is Reba Espadron (spelled phonetically). Shalita Russell (spelled phonetically) died and never testified in this case. And all of these allegations are an interview that she gave the police. It was Reba Espadron that you are discussing.

BY THE COURT:

And, the State would agree that Reba Espadron was in the back bedroom with her friend in the wheelchair. I am speaking about Shalita Russell.

BY THE COURT:

All right.

Move on.

***

MS. ANDRIEU CONTINUED HER ARGUMENT, DURING WHICH TIME THE FOLLOWING EXCHANGE TOOK PLACE:

***

BY THE COURT:

I think I understand. I have an appreciation of what took place with Phillip Young.

BY MS. ANDRIEU:

Yes, Your Honor.

***

MS. ANDRIEU CONTINUED HER ARGUMENT, DURING WHICH NO OBJECTIONS WERE MADE OR NOTED.

***

BY THE COURT:

Anything else to add?

[17]

BY MS. KELLEY:

Yes, Your Honor.

***

MS. KATHY KELLY MADE A REBUTTAL ARGUMENT ON BEHALF OF THE DEFENDANT, JUAN SMITH, DURING WHICH

TIME NO OBJECTIONS WERE MADE OR NOTED, BUT THE FOLLOWING EXCHANGE TOOK PLACE:

***

BY THE COURT:

But, you are putting — you are doing things in different times. People running outside with the masks is not at the same instance of the identification by Boatner.

***

MS. KELLY CONTINUED HER REBUTTAL ARGUMENT ON BEHALF OF THE DEFENDANT, JUAN SMITH, DURING WHICH TIME NO OBJECTIONS WERE MADE OR NOTED, BUT THE FOLLOWING EXCHANGE TOOK PLACE:

***

BY THE COURT:

Would you address that point, Ms. Andrieu?

She indicated that the female that was inside the residence identified that the first person coming through the door was wearing a — covering his face.

Did she use the words, "the first person who came through the door or the first person she saw?"

***

MS. ANDRIEU MAKES AN ARGUMENT ON BEHALF OF THE STATE OF LOUISIANA, DURING WHICH TIME NO OBJECTIONS WERE MADE OR NOTED:

[18]

MS. KELLY CONTINUED HER ARGUMENT ON BEHALF OF THE DEFENDANT, JUAN SMITH, DURING WHICH TIME NO OBJECTIONS WERE MADE OR NOTED.

* * *

BY THE COURT:

Anything else to add?

BY MS. ANDRIEU:

One moment, Your Honor.

No, Your Honor.

BY THE COURT:

I am ready to rule in the case.

I don't have to take any time for this.

I have been listening to this for quite a while. I am denying postconviction relief.

Take time to take writs on my decision.

BY MS. KELLY:

Yes.

I would like to take a writ, Your Honor.

BY THE COURT:

Yes.

BY MS. KELLY:

And, we would request thirty days as a return date.

BY THE COURT:

Yes, I'll grant that.

Okay.

And, you have to get one more transcripts, right?

BY MS. KELLY:

Yes.

I ordered that today, both from today and last week.

BY THE COURT:

Okay.

Let's come up here and talk about the protocol of where we go from [19] here.

* * *

A CONFERENCE IS HELD AT THE BENCH, OFF OF THE RECORD, WITH ALL COUNSELORS PRESENT.

BY THE COURT:

All right.

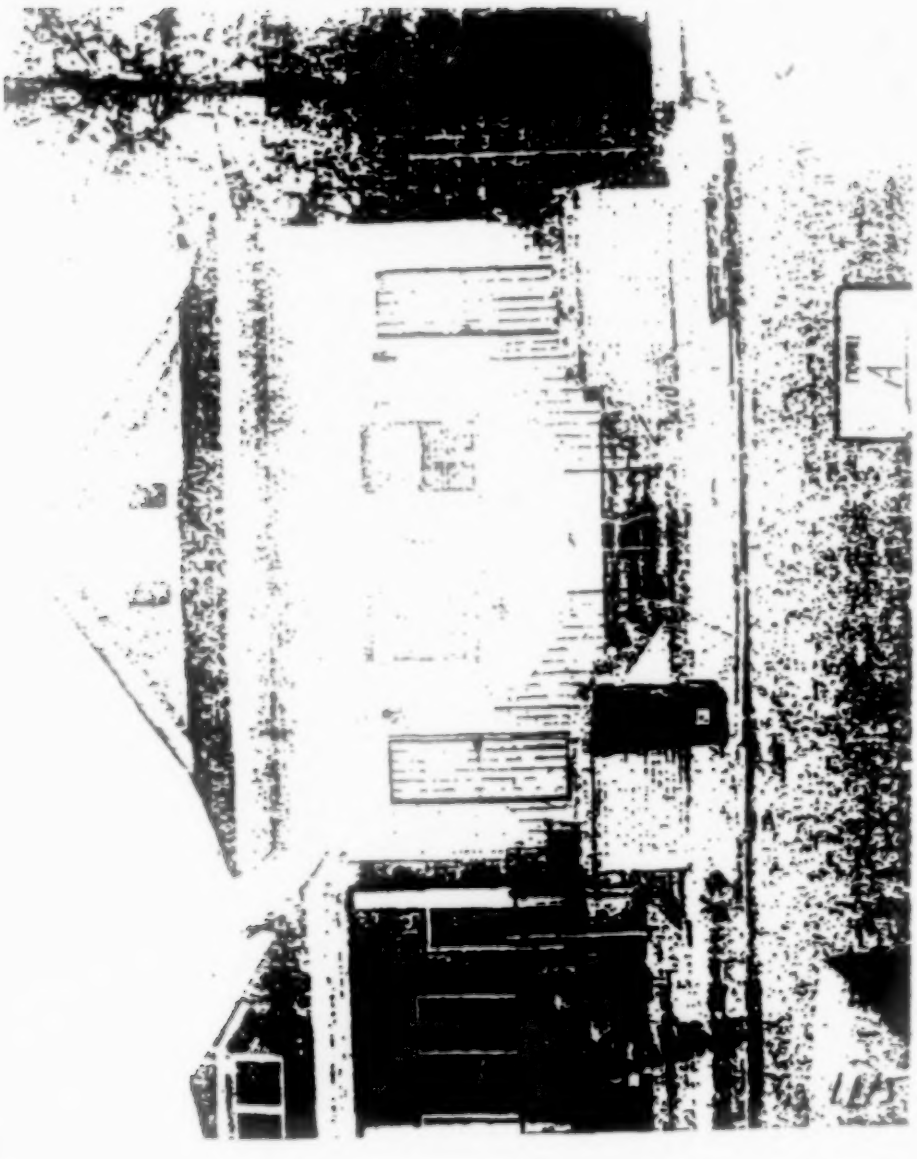
It is my understanding that — I denied the postconviction in the non-capital case which will go to the Fourth Circuit Court of Appeals and it will then go to the Supreme Court of Louisiana and wherever else it may go.

As to the capital case, I don't think that any movement can take place on the capital case until we complete the tracking of postconviction on the non-capital case.

I am going to have to recess for one second.

* * * * *

RESPONDENT'S EXHIBIT A FROM HEARING ON PETITION FOR POSTCONVICTION RELIEF (PHOTOGRAPH)



RESPONDENT'S EXHIBIT B FROM HEARING ON PETITION FOR POSTCONVICTION RELIEF (PHOTOGRAPH)

578-343'
EXHIBIT
B

ARTICLES FROM NEW ORLEANS TIMES-PICAYUNE (JUNE 7, 1995)

The Times-Picayune

NEW ORLEANS EDITION

WEDNESDAY

* * * * *

...holmke, who led an independent investigation of the slayings while also cooperating with detectives, said the four could be responsible for as many as 13 murders.

The Thompson case had be...fuddled a special NOPD task force until the four suspects emerged in the last several weeks, Capt. Donald Curole said. The key tip came from a local prisoner, sources said. A reward of $25,000 offered by Thompson and others does not appear to have played a major role in the break

See KILLINGS, A-6

Tangie Thompson and her son, Devyn, were killed Feb. 5 in their eastern New Orleans home along with Thompson's fiance, Andre Wilks. Police say their home was ransacked and the three were killed so they could not identify their assailants.

By MICHAEL PERLSTEIN and CHRISTOPHER COOPER
Staff writers

A... teen-agers in the 3... Thomas public housing complex, Donielle Bannister and Kintad Phillips were considered charter members of the feared Calliope Posse, a loose-knit gang of youngsters that police describe... as one of the most brazenly violent drug rings ever encountered in New Orleans.

During a four-month period in...

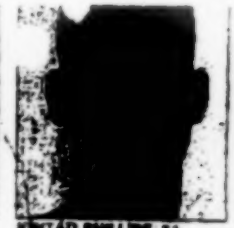
SPECTS, A-...

The Times-Picayune

NEW ORLEANS EDITION

SUNDAY

DONNELLE BANNISTER, 20
In custody



KINTAD PHILLIPS, 21
Still at large

JUAN SMITH, 20
Still at large

ROBERT TRACKLING, 18
In custody

Ex-Saint is cleared; 2 men jailed, 2 sought in killings

By JAMES VARNEY and WALT PHELAN
Staff writers

Four ruthless, experienced killers from New Orleans looking for drugs and money were behind the murders of former Saints player Bennie Thompson's son, ex-wife and her fiance, authorities said Tuesday in an announcement that lifted a cloud of suspicion from the football player.

"Bennie Thompson has been eliminated as a suspect," Superintendent Richard Pennington said.

Police announced they booked two more Tuesday with three counts of first-degree murder and aggravated burglary stemming from the Feb. 5 bloodbath in eastern New Orleans that left Tangie Thompson, 28, her son, Devyn, 3, and Andre White, 30, riddled with bullets.

Two suspects arrested were identified as Donnelle Bannister, 20, 3003 Toledano St., and Robert Trackling, 18, 3110 Broadway. The two were already jailed in New Orleans on unrelated charges of armed robbery and aggravated battery that occurred three weeks ago, police said.

Two other men — Kintad Phillips, 21, known as "Bucko," and Juan Smith, 20, who carries the street name "Short Dog," also are being sought in the slayings, police said, adding that Phillips may have fled to Florida.

All four suspects are under investigation for additional crimes, police said. Bennie Thompson's attorney, Rick Simmons, who led an independent investigation of the slayings while also cooperating with detectives, said the four could be responsible for as many as 13 murders.

The Thompson case has befuddled a special NOPD task force until the four suspects emerged in the last several weeks, Capt. Donald Cutrone said. The key tip came from a local prisoner, sources said. A reward of $25,000 offered by Thompson and others does not appear to have played a role in the break.

See KILLINGS, A-6

Bennie Thompson kisses a photo of his son, Devyn, during a news conference in February at which he offered a $25,000 reward. Police have eliminated Thompson as a suspect in the murders of his son, his ex-wife and her fiance.

STAFF FILE PHOTO BY CHUCK COOK

Tangie Thompson and her son, Devyn, were killed Feb. 5 in their eastern New Orleans home along with Thompson's fiance, Andre White. Police say their home was ransacked and the three were killed so they could not identify their assailants.

Suspects' gang ties infamous

By MICHAEL PERLSTEIN and CHRISTOPHER COOPER
Staff writers

As teen-agers in the St. Thomas public housing complex, Donnelle Bannister and Kintad Phillips were considered charter members of the feared Calliope Posse, a loose-knit gang of youngsters that police describe as one of the most brazenly violent street gangs ever encountered in New Orleans.

During a four-month period in

SPECTS, A-6

* * * * *

Killings: Robbery is cited as motive

From Page 1

through, police said.

Sources familiar with the case said the four suspects believed Andre White, who had several drug arrests on his record but no convictions, was involved in narcotics. The four either trailed White home from his job at a car wash, or waited for him near the house and jumped him in his garage, sources said.

Robbery was the motive for the murders, Pennington said, although police declined to say if anything was stolen from Tangie Thompson's home at 8130 Morrison Ave. Arrest warrants for Smith and Phillips said they and Bannister ransacked the house searching for drugs and cash, then slaughtered the Thompsons and White in the den to eliminate them as witnesses. Trackling, driving the getaway car, waited outside, the warrants said.

Pennington said evidence linking the suspects to the Thompson slayings had been found through search warrants. The arrest warrants listed a Ruger 9 mm pistol as the murder weapon, and sources said police already had the gun from a May 6 shooting allegedly involving Bannister and Trackling. Ballistics tests have identified it as the weapon that killed the Thompsons and White, sources said.

Tuesday's news conference appeared to close a painful chapter for Bennie Thompson, who is now a special teams player for the Cleveland Browns. Thompson went through an acrimonious divorce from Tangie Thompson last year, and had threatened to kill her, court papers said.

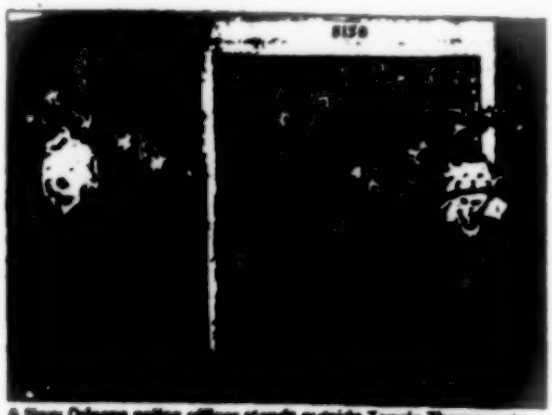
As a result of that history, and Thompson's inability to provide detectives with an airtight alibi for the night of Feb. 5, police continued to explore his possible involvement in the case.

After announcing he would add to the reward pot in February, Thompson said he would not comment on the case until an arrest was made, and he may appear at a news conference today in New Orleans, Kohnke said.

In Cleveland for a football minicamp, Thompson told a TV station that he was glad to hear that arrests had been made and that his name is being cleared.

"I just want people to know I would never have done anything like that," he told WOIO TV. "I would never have even gotten involved in stuff like that. Regardless of the kind of relationship me and my ex-wife had, I wouldn't never have done anything like that, especially to my son."

"We've said all along that Bennie Thompson was a victim in this case, and he is very pleased to see the wheels of justice finally starting to turn," Kohnke said.



A New Orleans police officer stands outside Tangie Thompson's house shortly after the victims' bodies were found in February.

STAFF FILE PHOTO BY BRYAN S. BERTEAUX

Kohnke said Thompson's alibi problems were exaggerated, but he declined to comment on ambiguous signals from NOPD brass at Tuesday's news conference. Police were asked twice if they had cleared Thompson unconditionally and twice top officers declined to say yes. Pennington then stepped in, and said Thompson was no longer a suspect.

If the chief says he is exonerated, that's good enough for me," Kohnke said. "We're absolutely thrilled at this development."

But relatives of Tangie Thompson were less elated. Her mother, Brenda Mayfield, says she remains skeptical of the robbery scenario, since both Tangie Thompson and White's bodies had not been stripped of expensive jewelry.

In addition, Mayfield said she entered the house after the slayings to get clothes to dress her daughter for the funeral. She found Tangie's belongings strewn about her bedroom while White's dresser and closet were untouched.

"I'm happy they've made an arrest, but I just can't see this being a robbery since nothing was taken," she said. "I feel like someone else was involved, and I think someone hired those people to kill my daughter.

"It's going to come out, because these four guys aren't going to go down by themselves," she said.

Suspects: Tied to ruthless gang

From Page 1

1998, three murders and the attempted murder of a police officer were pinned on the group, including a July 31 murder in broad daylight for which Bannister and Phillips were eventually arrested.

As the two awaited trial, other Cutthroat Posse members were either killed or convicted and the group disintegrated.

But after Bannister and Phillips were acquitted of murder Jan. 11, the trail of bloodshed picked up where it left off, police said.

Bannister and Phillips — along with two other men, Robert Trackling and Juan Smith — now stand charged with one of the city's most infamous slayings, the Feb. 5 triple murder that took the life of Tangie Thompson, her 3 year old son, Devyn, and fiance Andre White. Thompson was the ex-wife of former New Orleans Saints defensive back Bennie Thompson.

Investigators had no trouble locating Bannister and Trackling. The two have been in Orleans Parish Prison since May 6, charged with shooting a New Orleans sixth grader as she walked home from a snowball shop. The 13-year old was shot twice in the upper chest and survived, what police said was a robbery attempt.

Those incidents may be the tip of the iceberg, police sources said. Detectives are looking at Cutthroat Posse alumni as the primary suspects in the March 1 massacre of five people in a house on North Roman Street.

Phillips was reportedly injured in the gunbattle, and may have been the instigator of the blood bath, police sources said.

"It was a double cross from a drug deal," one veteran officer said. "If Phillips got hit in some kind of crossfire. He made detectives know the posse guys were responsible from a long time ago."

All told, sources said, the group could be responsible for 21 killings.

THE FOUR SUSPECTS

[illegible]
- [illegible] charges of attempted murder and armed robbery in the shooting of a 13-year-old girl May 6. Trackling is co-defendant.
- In January, with co-defendant Phillips, found innocent of 1998 second-degree murder of a man in St. Thomas housing development.

[illegible] "Cutthroat" Phillips, [illegible]
- Alleged leader of the group of four suspects; believed to be in Florida.
- Chief suspect in quadruple murder case on North Roman Street last March; suffered buttock wound in the gunbattle.
- Since 1997 has been locked with second-degree murder and distribution of heroin and crack. Pleaded guilty and served two years on crack charge. With co-defendant Bannister, found innocent on the murder charge. Heroin charge dropped for insufficient evidence.

Juan "Quiet Storm" Smith, 25
- Longtime rap sheet of the quartet. Booked in 1994 with attempted second-degree murder, crack distribution and possession of marijuana.
- Earlier juvenile arrests on charges of auto theft and possession of stolen property.
- Attempted second-degree murder charge dropped after victim was killed a few weeks before trial. Crack charge and marijuana charge dropped on technicalities.

Jennifer Trackling, 18
- Police say he implicated the others in Thompson murders.
- Awaiting trial in the 13-year-old girl's robbery and shooting.

Officials familiar with the gang said much of the early violence arose from a long-standing struggle within St. Thomas for control of heroin distribution near the river.

The group's turf was known as "The Valley," a dimly lighted stretch of St. Andrew Street flanked by abandoned buildings.

They began with drug dealing and robbery, but quickly graduated to murder, according to several officers and residents.

A reputation for violence was cemented in September 1997, when about half a dozen youths roughed up members of the gang-style I. Real truck of corporal, went on a half hour parade, then peppered two men in a drive-by shooting before being spotted by officers.

When the officers caught up to the truck, gang members spilled from the back, guns blazing.

Officers Larry Cox and Dan Scanlan eluded the bullets and captured one of the riders, Jermaine "AK" Baker. Inside the truck, the officers found six assault rifles and a 9mm pistol.

Baker, who was once considered the leader of the Cutthroat Posse, was convicted in December 1998 of a double murder in which he sprayed gunfire into a crowd on Easter Sunday.

He is now serving two life sentences.

584

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 12 2011

No. 10-8145

In the Supreme Court of the United States

JUAN SMITH, PETITIONER

v.

BURL CAIN, WARDEN

ON WRIT OF CERTIORARI TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT OF LOUISIANA

BRIEF FOR THE PETITIONER

KATHLEEN KELLY
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* Admitted in Illinois and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Bar Rule 49(c)(8).

QUESTION PRESENTED

In 1995, a group of men burst into a house, ordered the occupants to lie down on the floor, and opened fire; five people were killed. Petitioner was the only person brought to trial. He was tried in Orleans Parish, Louisiana, a jurisdiction whose district attorney's office has a long and disturbing history of failing to produce exculpatory evidence to criminal defendants.

Petitioner was linked to the crime solely on the basis of an identification by one of the survivors. At trial, the witness testified he was certain about his identification. But materials disclosed by the state after trial revealed that the witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators. Other subsequently disclosed materials included statements by other witnesses casting doubt on the witness's testimony; a statement by an apparent perpetrator seemingly denying petitioner's involvement; a statement by a firearms examiner that contradicted his trial testimony implying that petitioner was one of the shooters; and a confession from another individual. The question presented is as follows:

Whether the failure of the Orleans Parish district attorney's office to produce the foregoing information before petitioner's trial violated his right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases, because the information was material to the issue of guilt.

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In the Supreme Court of the United States

No. 10-8145

JUAN SMITH, PETITIONER

v.

BURL CAIN, WARDEN

ON WRIT OF CERTIORARI
TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT
OF LOUISIANA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The trial court's oral ruling denying petitioner's application for state postconviction relief (Pet. App. A18) is unreported. The orders of the Louisiana Court of Appeal (Pet. App. B1) and the Louisiana Supreme Court (Pet. App. C1) denying petitioner's applications for supervisory writs are also unreported.

JURISDICTION

The order of the Louisiana Supreme Court was entered on September 24, 2010. The petition for a writ of certiorari was filed on December 20, 2010, and granted on June 13, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

After a jury trial, petitioner was convicted in Louisiana state court on five counts of first-degree murder. The testimony at trial established that a group of men burst into a house, ordered the occupants to lie down on the floor, and opened fire, resulting in five deaths. Petitioner was the only person tried for the crime; the only evidence linking him to the crime was an identification by one of the survivors. Petitioner was sentenced to life imprisonment without parole; his conviction and sentence were affirmed on direct review.

Petitioner then applied for state postconviction relief, contending, *inter alia*, that the Orleans Parish district attorney's office had withheld material evidence in violation of his right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. In connection with that application, petitioner obtained materials revealing that the key witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators. Other newly disclosed materials included statements by other witnesses casting doubt on the key witness's testimony; a statement by an apparent perpetrator seemingly denying petitioner's involvement; a statement by a firearms examiner that contradicted his trial testimony implying that petitioner was one of the shooters; and a confession from another individual.

After an evidentiary hearing, the trial court summarily denied petitioner's application for postconviction re-

lief from the bench. Pet. App. A18. The Louisiana Court of Appeal denied petitioner's application for discretionary review without comment, *id.* at B1, as did the Louisiana Supreme Court, *id.* at C1.

A. Background And Trial Proceedings

1. On the evening of March 1, 1995, officers from the New Orleans Police Department (NOPD) responded to a report of gunshots at 2230 Roman Street, a house in New Orleans's Eighth Ward. J.A. 58-61. Upon arriving, they found five people lying inside, all of whom had been shot. J.A. 60-61. James Jackson, Willie Leggett, and Shelita Russell were found in the kitchen; Jackson and Leggett were dead, and Russell was critically injured. J.A. 61-62, 67-70. Robert Simons and Phillip Young were found in an adjoining living room; Simons was dead, and Young was critically injured with multiple gunshot wounds (including a wound to the head). J.A. 62-68, 71, 135-136. In addition, officers found a sixth person, Ian Jackson, in an alley behind the house; Jackson was also dead, with injuries suggesting that he was shot as he was trying to flee the house. J.A. 65-66, 71, 83-86. About a week later, Russell died of her injuries, bringing the total number of deaths to five. J.A. 76, 79.

There were three persons at the scene who had not been shot: Rebe Espadron, Reginald Harbor, and Larry Boatner. J.A. 60, 63, 101-104. Espadron lived at the house with Simons, her cousin, and Russell, her sister; Espadron and Simons used the house to sell crack cocaine and marijuana to neighborhood residents. J.A. 93-94, 113, 170.

2. On August 31, 1995, a grand jury in Orleans Parish, Louisiana, indicted petitioner and Young on five counts of first-degree murder. R. 1A-1D, 1I. Because of

his injuries, Young was adjudged to be incompetent to stand trial. J.A. 11.

a. Before trial, petitioner filed a comprehensive motion for "discovery of information necessary to a fair trial." J.A. 17-31. In response, the state produced a limited set of materials and represented that, aside from those materials, "[n]o exculpatory or favorable evidence is available to the State at the present time." J.A. 32-34.

b. The case proceeded to trial before a jury. At trial, the prosecution presented the following evidence.

i. Espadron testified that, on the evening of March 1, she and the others found at the scene (apart from Young) had assembled at the house for a social gathering. J.A. 95-97. Most of the invitees stayed in the kitchen, where they smoked marijuana, drank, and played cards; Espadron and Harbor were in a bedroom off the living room watching television. J.A. 97-98, 117. Hearing a commotion in the kitchen, Espadron walked through the living room and cracked open the door to the kitchen to see what was going on. J.A. 98-99. When she opened the door, she encountered a man pointing a gun in her face; he ordered her to lie on the floor. J.A. 99. Espadron shut the door and ran back into the bedroom, at which point she heard gunshots. J.A. 100-101. She hid in the bedroom with Harbor until the shooting stopped. J.A. 100-102.

Espadron conceded that she had been unable to see the face of the man pointing the gun, because his mouth was covered and only his eyes were visible. J.A. 99, 110. Espadron was shown fourteen photographic lineups over the course of four months, but was never able to identify the man. J.A. 108. In addition, because she had only cracked open the door and the man pointing the gun had blocked her view, she could not observe any other perpetrators. *Ibid.* Espadron was able to testify only that the

weapon pointed at her was a "big gun, like a big handgun." J.A. 110.

ii. Harbor testified that he was "loung[ing]" in the bedroom with Espadron when they heard a commotion and Espadron went to investigate. J.A. 231-232. When Espadron returned to the bedroom, Harbor heard the shooting. J.A. 232. He grabbed a gun and hid in a corner with Espadron. He then heard a car drive away; the car was noisy, as if it had a bad muffler. J.A. 232-233. Harbor testified that he did not see any perpetrators. J.A. 235.

iii. The sole witness linking petitioner to the crime was Boatner. He testified that he was sitting in the kitchen drinking when he heard a loud noise in front of the house, resembling that of a car without a muffler. J.A. 171-174. Boatner got up to investigate and opened the front door. J.A. 174. When he did, "some guys just rushed in with guns," demanding "money and marijuana." *Ibid.* Within "[s]econds," Boatner testified, the men ordered everyone to the ground. J.A. 175, 199.

According to Boatner, the first man who had entered the house forced him to the floor and kept a gun to his head. J.A. 175-177. One of the other perpetrators then ordered him to get back up. J.A. 177. When Boatner asked what he should do, the first man struck him on the head with his gun, causing a laceration. J.A. 178, 212. Boatner fell to the ground and was lying there when Espadron opened the door to inquire about the commotion. J.A. 178-179. After Espadron shut the door, according to Boatner, the perpetrators began shooting. J.A. 180. Once the shooting stopped, Boatner heard one of the perpetrators say "let's go," then heard three car doors slam and a car drive away. J.A. 181.

Boatner testified that, in the "[s]econds" between opening the front door and being forced to the ground,

he could "[d]efinitely" see the face of the first man who rushed in. J.A. 176, 199. During that brief moment, he said, he and the man were "[f]ace to face." J.A. 175. Boatner testified that the man was not wearing a mask, though he was unsure whether any of the other perpetrators was wearing one. J.A. 175, 177. He further testified that he had told the police that the man had a low-cut haircut and "golds in his mouth." J.A. 186, 200.[1]

Boatner also testified that the first man who had entered the house was carrying a silver 9-millimeter handgun. J.A. 175, 178. He added that there were two other perpetrators, one who carried an AK rifle and another who carried a MAC-10 machine pistol. J.A. 180.[2] Boatner stated that he "kn[e]w" what a 9-millimeter handgun "looks like" and that he "kn[e]w all about" the other guns as well. J.A. 178, 201.

Over the course of several months, Boatner was shown numerous photographic lineups but was unable to make an identification. J.A. 184-187. On or around June 7, 1995, Boatner obtained a copy of the New Orleans

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[1] In this context, the term "golds" refers to cosmetic jewelry, often made of gold, worn over the teeth. "Golds" (or "grills," as they are also known) are commonly associated with hip-hop culture, particularly in the South. See J. Freedom du Lac, *Cutting-Edge Choppers; Bruce Yourselves: Designer 'Grills' Have Rappers Smiling*, Wash. Post, Jan. 17, 2006, at C1.

[2] "AK" is the popular shorthand for a series of well-known Soviet-made Kalashnikov assault rifles, including the AK-47 and AK-74; "MAC-10" is the popular shorthand for the Ingram Model 10 machine pistol. See, *e.g.*, *United States* v. *Miles*, 772 F.2d 613, 615 (10th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); Richard D. Jones & Andrew White, *Jane's Guns Recognition Guide* 221, 304-307 (5th ed. 2008) (Jones & White); Ian V. Hogg & John S. Weeks, *Military Small Arms of the 20th Century* 166, 271 (7th ed. 2000) (Hogg & Weeks).

Times-Picayune that contained an article implying that petitioner was a suspect in the shootings (along with Donielle Bannister, Kintad Phillips, and Robert Trackling); the article was accompanied by a photograph of petitioner. J.A. 160-161, 190, 582-584. After seeing the newspaper, Boatner testified, he identified petitioner as the first man who had entered the house. J.A. 187-190. Boatner, however, took no action to alert the police of that alleged identification, but instead left town for Mississippi. J.A. 190-191, 213-214. Two weeks later, Boatner returned to New Orleans. J.A. 191. Even then, Boatner did not contact the police; instead, he checked into a drug-rehabilitation program at a local hospital. J.A. 191-193, 218-219.

While Boatner was at the hospital, he was visited by Officer John Ronquillo, the principal detective assigned to the case. Ronquillo showed Boatner a lineup containing petitioner's photograph, and Boatner identified petitioner as the first man who had entered the house. J.A. 174-175, 192-195. According to contemporaneous notes by a hospital aide, Boatner had expressed concern on that same day about "'being harassed by an NOPD (Detective Steve Ruffilo)' to identify a suspected perpetrator or perpetrators" involved in the shootings. J.A. 247. According to the notes, Boatner had expressed "feelings of 'fear and confusion'" and had been "offered assurance" that "the officer would not be permitted on th[e] [hospital] unit" in the future. *Ibid.*

From the witness stand, Boatner identified petitioner as the first man who had entered the house. J.A. 174-175, 195-196. Boatner testified that he had repeatedly tried to look at the man; that there was "[n]o doubt" that petitioner was that man; and that he would "never forget [petitioner's] face." J.A. 177, 194, 196. In identifying petitioner, Boatner heavily relied on his belief that the first man had a "[m]outh full of gold." J.A. 196. After the

prosecutor asked petitioner to show his teeth to the jury, Boatner said that it was the "[s]ame mouth" he had seen on the evening of the shootings. *Ibid.*

iv. The remainder of the prosecution's case at trial consisted almost entirely of testimony from various officials.[3] Officer Ronquillo testified that he had spoken with Boatner at the crime scene and that Boatner appeared to be "coherent" and "articulated very well the events that had transpired." J.A. 137. At the same time, Ronquillo acknowledged that no one other than Boatner had identified petitioner. J.A. 139. Ronquillo also conceded that, "as amazing as it may seem," officers had failed to recover any of petitioner's fingerprints from the scene. *Ibid.*

Another responding officer, Joseph Narcisse, testified that he had spoken with Boatner, Espadron, and Shelita Russell at the scene. Narcisse testified that Russell had provided her name, address, and date of birth, but "was unable to give any further details about the incident." J.A. 72-73.

The prosecution called the two pathologists who had performed the autopsies on the victims. Alvaro Hunt, who had performed Russell's autopsy, testified that her wounds "could" have been "consistent with gunshots from a 9 millimeter handgun," but conceded that it was "just a guess" and that he could not state his opinion "with any degree of certainty." J.A. 76, 79-81. William Newman, who had performed the autopsies on the other four victims, stated that he could not identify the caliber of bullet that caused any of their wounds. J.A. 81, 88.

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[3] Eddie Young, Phillip Young's brother, briefly testified that Phillip Young knew petitioner. J.A. 149-150.

The prosecution also called Kenneth Leary, a police firearms examiner. Leary testified that officers had recovered three types of casings from the scene: (1) twenty-six 9-millimeter casings; (2) nineteen 7.62-by-39-millimeter casings; and (3) three .25-caliber casings. J.A. 153. Leary further testified that, "[a]fter examining all 26 of * * * the 9-millimeter cartridge cases, [he] was able to reach the conclusion that all 26 cartridge cases w[ere] fired by one particular weapon, one 9-millimeter handgun." J.A. 155. According to Leary, the 7.62-by-39-millimeter casings came from a single AK-47 assault rifle, and the .25-caliber casings came from a .25-caliber pistol that officers had also recovered from the scene. J.A. 153-156.

v. The prosecution presented substantial evidence that Phillip Young, who had been found critically wounded at the scene, was one of the perpetrators. Espadron and Boatner both testified that they had never seen him before and expressed their belief that he was a perpetrator; in fact, after the gunfire had subsided, Boatner was going to shoot Young until Espadron interceded. J.A. 103-104, 114, 182-183. Young was found with the .25-caliber pistol in his hands. J.A. 63-64. Young had been shot three times; Espadron testified that Simons, whose body was found on top of Young's, had been carrying a .25-caliber pistol that day. J.A. 62-63, 104, 112, 135-136.

In addition, Officer Ronquillo testified that officers had found a beeper on Young's person. J.A. 119. One phone number was in the beeper several times along with the number "187"—slang for murder. J.A. 119-120. The phone number was traced to Kintad Phillips, who was named in the Times-Picayune article as another potential suspect in the shootings. J.A. 120-121. Despite the evidence linking Young to the shootings, Ronquillo

conceded that he had never shown a photographic lineup with Young in it either to Espadron or to Boatner. J.A. 125.

At petitioner's trial, Officer Ronquillo testified that he had visited Young at the extended-care facility where he was being treated for his injuries. J.A. 135. According to Ronquillo, Young was in "really bad shape" and was not "able to communicate with [him] at all." J.A. 135-136.

3. Petitioner's defense rested on the insufficiency of the prosecution's evidence against him. The defense called only a single witness in its case in chief, the regional director for the Louisiana Office of Alcohol and Drug Abuse. J.A. 241-242. That witness testified that the hospital where Boatner was being treated at the time of his initial identification only admitted persons with "life-threatening" substance-abuse problems. J.A. 245.

4. Petitioner was convicted on all five counts of first-degree murder and sentenced to life without parole. J.A. 13-14. The Louisiana Court of Appeal affirmed petitioner's conviction and sentence, 797 So. 2d 193 (2001) (Table), and the Louisiana Supreme Court denied review, 824 So. 2d 1189 (2002). This Court also denied review. 537 U.S. 1201 (2003).

B. Other Proceedings

1. One year after the trial in this case, petitioner was tried in the same court on three counts of murder stemming from a separate incident that occurred at 8130 Morrison Road approximately one month before the Roman Street shootings. J.A. 14-15; R. 1G-1L. The three other individuals who had been named in the Times-Picayune article concerning the Roman Street shootings—Donielle Bannister, Kintad Phillips, and Robert Trackling—were also indicted for the Morrison

Road shootings. R. 1G-1L. After pleading guilty to manslaughter, Trackling testified against petitioner, describing petitioner's alleged involvement in the shootings. See *State* v. *Smith*, 793 So. 2d 1199, 1202-1203 (La. 2001). Based largely on Trackling's testimony, petitioner was convicted on all three counts. J.A. 14-15.[4]

The prosecution then sought the death penalty against petitioner. In the penalty phase, the prosecution heavily relied on evidence of petitioner's prior convictions for the Roman Street shootings; testimony concerning those shootings constituted the vast majority of the testimony offered by the prosecution in its case in chief. See *Smith*, 793 So. 2d at 1208. Unusually, the prosecution called Officer Ronquillo—who appears not to have participated in the investigation of the Morrison Road shootings—to testify at length about the grisly scene of the Roman Street shootings. See *ibid.* Over a defense objection, the prosecution used Officer Ronquillo's testimony to introduce photographs of the Roman Street crime scene. See *ibid.* Petitioner was subsequently sentenced to death. J.A. 5.

2. The Louisiana Supreme Court affirmed petitioner's conviction and sentence. See *Smith*, 793 So. 2d at 1208. Although it acknowledged that Officer Ronquillo's testimony "injected an arbitrary factor" into the jury's deliberations in the penalty phase, it concluded that the error in permitting the testimony "d[id] not undermine

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[4] Bannister pleaded guilty to murder and was sentenced to life without parole; Phillips was tried after petitioner, convicted, and sentenced to life without parole; and Trackling was sentenced to ten years of imprisonment. J.A. 5-7.

confidence in the jury's sentencing verdict." *Id.* at 1210. This Court denied review. 535 U.S. 937 (2002).[5]

C. Application For Postconviction Relief And Disclosure Of *Brady* Information

1. In 2004, petitioner filed a *pro se* application in the trial court for state postconviction relief in the Roman Street case; the application was assigned to the same judge who had tried the case. Petitioner contended, *inter alia*, that the Orleans Parish district attorney's office had withheld material evidence in violation of his right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. R. 438-439. Petitioner moved for the production of files from the district attorney's office, R. 439-440, and separately sought production under Louisiana's public-records law, R. 471-472. Petitioner also filed a motion for the appointment of counsel. R. 447-449.

2. Petitioner was appointed counsel, R. 3209-3210, and counsel made renewed requests for materials from the district attorney's office and also from the police department, see, *e.g.*, R. 3201-3213, 3237-3242. The state disclosed some materials in response to counsel's requests and other materials under compulsion of court order. R. 488. The disclosed materials revealed a wealth of information favorable to petitioner. A summary of those materials follows.

a. The state disclosed abundant information calling into question Boatner's identification of petitioner. Boatner himself spoke to the police on four separate oc-

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[5] In the Morrison Road case, petitioner has not yet filed an application for state postconviction relief; the trial court has stayed the deadline for filing the application pending the Court's decision in this case. See Pet. App. A19.

casions in the immediate aftermath of the shootings. On those occasions, he gave conflicting accounts of whether, and to what extent, he could identify any of the perpetrators.

i. At 9:05 p.m. on March 1, 1995, shortly after the shootings, Officer Ronquillo interviewed Boatner at the scene. The notes summarizing that interview provide in relevant part:

> Boatner advised Ronquillo that he opened the door of the residence after hearing a knock, and observed three black males with rifles and guns, exit an old, white, four door automobile, with a loud muffler. Boatner was confused if he heard a knock or opened the door after hearing the loud muffler on the vehicle.
>
> Boatner continued by telling Ronquillo that the subjects demanded money, and then hit him in the back of the head. Boatner then added that everyone [in] the kitchen began to lie down on the floor and it was then that they began shooting. Boatner stated that he was lying by Willie Legget[t], and just closed his eyes and waited to be shot.
>
> Boatner then said that he heard three car doors slam and heard the vehicle with the loud muffler drive away in an unknown direction.
>
> * * *
>
> Boatner described the guns as being one AK type assault rifle, one Tech Nine type handgun, and a silver colored handgun. *Boatner could not supply any additional information on the weapons, or supply a description of the perpetrators other th[a]n they were black males.*

J.A. 251-253 (emphasis added).

ii. At 1:15 a.m. on March 2, Officer Archie Kaufman[6] interviewed Boatner at the police station. The transcript of that interview provides in relevant part:

> Q: Can you describe the subjects who[] shot the people in the house?
>
> A: I can tell you about one, the one who put the pistol in my face, he was a black male with a low cut, gold[s] in his mouth, I don't know how many, that's all, *I was too scared to look at anybody*, all of the[m] had guns, one had an AK, one had a TEC-9, the one who hit me had a chrome automatic, it was big. I hear the car because it was so loud, the muffler, I know it need a muffler. I opened the door, I see these two guys, one he throws the gun in my face, the other one walked in behind him, he had the AK. I saw him get out of a car, the third guy, I didn't see the guy he had a TEC-9, it was an Uzi. He was pointing it at everyone on the floor. *I was too scared to look at them, they was about my complexion, brown skinned.*
>
> * * *
>
> Q: Again, you say you can't describe any of the other shooters besides the one who put the gun in your face after you opened the door?

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[6] Kaufman was recently convicted of orchestrating a cover-up of a police shooting that left two civilians dead; the cover-up involved, *inter alia*, framing innocent civilians and inventing fake witnesses. See Laura Maggi & Brendan McCarthy, *Jury Gives NOPD Another Strike; Prosecutors Garner Nearly a Clean Sweep on Charges Against Five Danziger Defendants*, New Orleans Times-Picayune, Aug. 6, 2011, at A1.

A: No, I can't.

* * *

Q: Have you been forced or coerced into giving this statement?

A: No man, *I wish I could give y['a]ll a description.*

J.A. 293-297 (emphases added). Officer Kaufman relayed the contents of the interview to Officer Ronquillo; a brief summary of the interview is contained in the police department's notes. J.A. 256-257.

iii. Five days later, on March 6, Officer Ronquillo again spoke to Boatner. Ronquillo's handwritten notes state as follows:

> Larry Boatner — saw three n/m[7] coming in — guy on floor had to be with them making four guys — when left heard three doors slam — and car with bad muffler drove off — got up and saw people shot — *could not ID anyone because couldn't see faces* — Rebie in back room — heard Rebie open door — don't know Marty — *glanced at 1st one — saw man — through door — can't tell if had faces covered didn't see anyone* —
>
> Could identify car if running — .25 —
>
> Microwave — no dope — heroin —
>
> Saw 3 n/m come in and hit me in head — laid on ground pretended to be shot — closed eyes and waited for a bullet —
>
> *Could not ID — would not know them if — I saw them* —

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[7] In Officer Ronquillo's notes, "n/m" appears to be short for "Negro males."

J.A. 308 (emphases added).

iv. Seemingly later that same day, Officer Ronquillo called both Boatner and Espadron, who were residing at the same address. The notes summarizing that conversation provide in relevant part:

> *Both subjects advised Ronquillo that they could not identify any of the perpetrators of the murder.* Boatner added that he could identify the car if the motor was running.

J.A. 259-260 (emphasis added).

v. The state also disclosed notes from interviews of two other witnesses who provided information bearing on the validity of Boatner's identification of petitioner. Shelita Russell, who was critically injured in the shootings and died about a week later, spoke to police at the scene. According to handwritten police notes, Russell provided the following information:

> Female — face down against cabinets — conscious —
>
> Said — in kitchen saw people barge in — one — *black cloth across face — first one through door* — nfs

J.A. 310 (emphasis added).

In addition, on March 6, the police interviewed Dale Mims, a neighbor who provided additional details concerning the perpetrators. The handwritten police notes state as follows:

> Dale Mi[m]s * * * — heard shots, plenty — looked out door saw 3 n/m — 3 with AK's get in white car, Buick/Olds 4 door — heard 3 shotgun blast — 4th guy came out drove off
>
> *All wearing mask[s]* — *mask ski type covers whole face* — can't remember clothes

> 4th subject didn't see him get in car — drove to Elysian Fields[8] right — saw 4 n/m in car w/ mask[s] = NVD on subjects
>
> Just remember guns — all rifles — one w/ banana clip

J.A. 309 (emphasis added).

b. The state also disclosed information suggesting that Phillip Young had absolved petitioner of responsibility for the shootings.

i. According to police notes, on June 26, 1995, Officer Ronquillo received a phone call from Barbara Riley, the nurse treating Young at his extended-care facility. J.A. 271. Riley informed Ronquillo that, about a week earlier, Young "had begun talking and communicati[ng] with others." J.A. 272. Ronquillo went to visit Young less than three hours later. *Ibid.* Young's speech was "very slurred," but he could answer yes-or-no questions by blinking. *Ibid.*

Although the more formal police notes do not indicate that Officer Ronquillo interrogated Young concerning the Roman Street shootings, Ronquillo's handwritten notes disclose the following:

> Miranda — B. Riley present —
>
> Acknowledged understood rights —
>
> Short Dog/Bucko/Fats — No — Didn't shoot me
> *No — Not with me when went to house*
>
> Yes — one of people in house shot me

---

[8] "Elysian Fields" refers to Elysian Fields Avenue, which intersects Roman Street near the location of the shooting.

No — Not responsible — 'Posse'

Didn't drive to house — 'Posse'

Yes — Knows names of perps —

Yes — Drove in car —

Yes — girlfriend[']s car —

J.A. 311 (emphasis added). Of the people whom Young said were "[n]ot with [him] when [he] went to [the] house," the police believed that "Short Dog" was petitioner; "Bucko" was Kintad Phillips; and "Fats" was Donielle Bannister. J.A. 261, 284, 312.

ii. On March 13, Officer Ronquillo had interviewed Michelle Branch, Young's girlfriend. In the transcript of the interview, Branch stated that Young had driven away from their house in her car around 6:30 on the evening of the shootings. J.A. 299-303. She described the car as a light yellow Chrysler LeBaron that would "look white" at night. J.A. 301. According to Branch, the car "didn't have a muffler" and made a lot of noise. J.A. 301-302.

Branch told Officer Ronquillo that she had not seen her car since the night of the shootings, but that she had received telephone calls informing her that Kintad Phillips had been spotted driving it. J.A. 304-305. When Ronquillo asked Branch about Phillips's associates, she responded, "Fats, just Fats" (the presumed nickname for Bannister). Branch did not mention petitioner during the interview. J.A. 305.

c. In addition, the state disclosed information calling into question the proposition that the 9-millimeter casings found at the scene had come from a 9-millimeter handgun—the gun that Boatner testified petitioner had been carrying. According to police notes summarizing their conversations, in May 1995, Officer Ronquillo asked

Kenneth Leary, the police firearms examiner who later testified against petitioner, to conduct testing to determine whether the 9-millimeter casings matched a 9-millimeter handgun that had been seized from Donielle Bannister when he was arrested on another charge. J.A. 266. On May 15, Leary responded as follows:

> Leary advised Ronquillo that *the 9mm ammunition confiscated from the Roman Street murder was typed to have been fired from a Inter Tec, "Mac 11" model type, semi automatic weapon*, and not from the handgun confiscated from Bannister at the time of his arrest.

Ibid. (emphasis added).[9] Because Leary had already matched the casings to an Intratec or MAC-11 gun, he did not conduct the testing of the 9-millimeter handgun that Ronquillo had requested. *Ibid.*

d. Finally, the state disclosed evidence that arguably inculpated others and helped to explain how the police identified petitioner as a suspect in the first place. On May 19, 1995, Eric Rogers, an inmate at the Orleans Parish Prison, provided a statement to Officer Byron Adams concerning a conversation he had previously had with Robert Trackling, who was his cellmate. Rogers stated that, during their conversation, Trackling had confessed to carrying out the Roman Street shootings

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[9] A MAC-11 is a slightly smaller version of the MAC-10 machine pistol. See Hogg & Weeks 166. Intratec is a now-defunct firearms manufacturer best known for the TEC-9 machine pistol, which is similar in size and function to a MAC-10 or MAC-11. See, *e.g.*, *Navegar, Inc.* v. *United States*, 914 F. Supp. 632, 633-634 & n.2 (D.D.C. 1996), aff'd in part and rev'd in part, 103 F.3d 994 (D.C. Cir. 1997); *Merrill* v. *Navegar, Inc.*, 28 P.3d 116, 119 & n.3 (Cal. 2001); Jones & White 430.

with several associates. The transcript of the interview provides in relevant part:

> Q: In your own words why don't you tell me what knowledge you possess about th[e] * * * crimes. Start from the beginning when you first learned the information, from who you learned the information from and where you were.
>
> * * *
>
> A: I was on C4 and I got the information from Robert [Trackling]. [H]e came up on the (inaudible) where I'm at. And he told me about the first the first crime they done. He say they done it on N. Roman[,] he said that um it was him, Fat, Buckle and a guy they call uh, Short Dog. Say that they went up to the door and they knocked on the door and the guy open the door and they went in the house, and they had about 7 guys in there. And they made 'em lay down on the floor and they was asking the guys where where's the stuff and the guy didn't say nothing. They say that they had a girl in the um, room[,] she open the door and when she open the door all of 'em turned around and say one of the guys that was on the floor jumped up and grab his gun from under his shirt and he went to shooting at her. They say that they raised up the gun and they went to shooting them. They went to shooting back and hit them and say one of the guys who was shooting that got off the floor[,] his gun slid by um Darnell Ban[n]ister['s] foot, and Darnell Ban[n]ister picked up his gun and went to shooting the guy with that gu[n].
>
> Q: Then what transpired[,] then what happened?

> A: Then after that he say that they left[,] they left because they couldn't stay long because they had too much of noise from the gun from the fire, they had too much of noise and they had left.

J.A. 277-278, 281-282.

Officer Adams then asked Rogers if he could identify "Fat," "Buckle," and "Short Dog." J.A. 284. Rogers said that "Fat" was "Darnell Ban[n]ister," whom he described as having a "low fade haircut" and "golds in his mouth." *Ibid.* Rogers said that "Buckle" was "Contez Phillips," who also had a "faded haircut" and "golds in his mouth." *Ibid.* Rogers initially said that Trackling had told him that "Short Dog" was "Juan," but that Trackling "didn't give [him] no last name." J.A. 285. By contrast, when Adams later asked Rogers whether the three men "call themselves anything," he answered: "They call Contez Phil[l]ip[s] Buckle, they call Darnell Ban[n]ister Fat, Short Dog that's what they call him, they call Robert Home." *Ibid.* When Adams asked Rogers whether the men "have a name for their group," he replied that they called themselves the "Cut Throat Posse." *Ibid.* In response to a follow-up question asking him to name the members of that group, Rogers listed nine people, including Bannister and Phillips, but did not list petitioner. J.A. 286-287.

Officer Adams relayed the contents of the interview to Officer Ronquillo, who subsequently conducted an interview with Trackling. J.A. 266-267, 275. After being informed of his rights, Trackling, on the advice of counsel, asserted his right to remain silent. J.A. 275. At the same time, Trackling offered an unsolicited statement that he had been at work at a pizza shop on the night of the shootings. *Ibid.* Trackling's time card for that evening, however, showed that he had left work at 7:45; the shootings took place around 8:30. J.A. 248, 277.

D. Supplemental Application For Postconviction Relief

1. In the wake of the disclosures of the foregoing material, petitioner, proceeding through counsel, filed an 88-page supplemental application for postconviction relief. R. 38. In that application, petitioner contended that the failure of the Orleans Parish district attorney's office to produce the foregoing materials (among others) before trial violated his right to due process under *Brady* and related cases. R. 285-378.

2. The trial court held an evidentiary hearing on the supplemental application.

a. At the hearing, petitioner's trial counsel, Frank Larre, testified that he had not received any of the foregoing materials before trial. J.A. 322-338, 348-350, 353, 356, 358-360, 364. Larre further testified that he had practiced law in Louisiana for thirty-four years and, at the time of petitioner's trial, had represented approximately thirty-six defendants in murder trials. J.A. 314, 317-318. Larre noted that, in petitioner's case, he had retained a retired police officer as a private investigator, whom he "would have used" to follow up on any potentially material information. J.A. 317, 362.

Larre confirmed that petitioner's defense at trial rested on the insufficiency of the prosecution's evidence against him, because there was "no direct evidence" of petitioner's involvement in the shootings apart from Boatner's identification. J.A. 318, 369-370. As Larre explained, the state had "no weapon," "no fingerprints," and "no property taken from the place, nothing." J.A. 318. Larre maintained that the previously undisclosed materials, consisting as they did of materials that could have been used to impeach Boatner's crucial testimony and other exculpatory and impeachment materials, would "[a]bsolutely" have affected his approach to the

case. J.A. 323, 327-328, 333, 337-338, 349, 353, 360, 369-370.

b. Petitioner offered two other primary witnesses at the evidentiary hearing. Barbara Riley, Phillip Young's nurse, confirmed that, during the interview of Young conducted by Officer Ronquillo, Young had been able to answer yes-or-no questions through body movement. J.A. 420-421. Riley added that, as a general matter, Young "appeared to understand what you were saying to him" and could communicate with her in the same way. J.A. 423-424. Riley denied that Young was suffering from amnesia; instead, he was suffering from "aphasia, a lack of speech." J.A. 424.

Eric Rogers confirmed that, when he and Robert Trackling were cellmates, Trackling had told him about a multiple murder on Roman Street that he had committed with several associates. J.A. 428-429. Troublingly, however, Rogers testified that Trackling had never mentioned petitioner or "Short Dog." J.A. 429. Instead, Rogers said that, in his own interview with Officer Adams, he had mentioned petitioner and "Short Dog" only after Adams asked him to implicate petitioner:

> [W]hen I talked to Byron Adams, he asked me about a Short Dog. Did I know a Short Dog? So, I told him no. So, he said, did I hear of a Juan Smith? So, I told him no. And, he said that this was one of the guys that was supposed to have been in a murder.
>
> So, he said that if I do him a favor he would go talk to some people and get my life sentence took back. So, he had asked me to involve Short Dog, Juan Smith.

J.A. 430. When Rogers so testified, the trial judge intervened and repeatedly pressed him to confirm his testimony. Rogers did so, culminating in the following exchange with the judge:

Q: Just tell me exactly what you agreed to do.

A: He wanted me to implicate Juan Smith saying that Juan Smith was the shooter.

Q: Did you implicate Juan Smith?

A: Yes, sir.

Q: And, he took a statement from you saying that Juan Smith was part of the shooting on North Roman Street?

A: Yes.

J.A. 433. Rogers added that Adams had asked him to implicate petitioner before Adams "turned on the tape" to begin the interview. J.A. 435. Under continued questioning, Rogers steadfastly maintained that Adams had promised to help him "get [his] time took back" if he implicated petitioner. J.A. 437-443. After the interview was over, according to Rogers, Adams brought him food from McDonald's. J.A. 443.[10]

c. The state offered two primary witnesses at the evidentiary hearing. Boatner testified and offered largely the same version of events that he had at trial, though he conceded that he "d[id]n't know how many [perpetrators] was in there"—only that there were "two, for sure." J.A. 461-469, 477. Although the newly disclosed materials indicated that Boatner had spoken to the police on four separate occasions in the immediate aftermath of the shootings, Boatner testified that he could recall talking to the police about the events of that evening only once before his conversation with Officer Ronquillo months later at the hospital. J.A. 475-476.

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[10] By the time of the evidentiary hearing, Officer Adams had died. J.A. 438.

Dale Mims, the neighbor whose interview with the police had previously been undisclosed, also testified. He said that, after hearing the gunshots, he looked out his front door and saw two men wearing masks and carrying AK rifles get in a white car. J.A. 402-403, 413-414. When the car drove past, he saw three men in the car; by then, none of the men was wearing a mask. J.A. 403, 413-414, 416.

d. Petitioner also called Officer Ronquillo. He testified that he had communicated with Boatner "probably for about at least a good month" following the shootings and that, "over the course of [those] communications," Boatner "would supply different things." J.A. 510. Ronquillo confirmed that he had identified petitioner as a suspect in the Roman Street shootings only after speaking with Officer Adams, who relayed the contents of the interview in which Rogers purportedly implicated petitioner. J.A. 525-527. Prior to that conversation, Ronquillo had not investigated petitioner and had been unaware that he was allegedly known as "Short Dog." J.A. 552, 555. Ronquillo also confirmed that Trackling had refused to speak with him about the shootings. J.A. 527.

3. At the close of the hearing, the trial court denied petitioner's application for postconviction relief. The trial court issued no written ruling and made no findings of fact or conclusions of law. Instead, ruling from the bench, the trial court stated in full as follows:

> I am ready to rule in the case.
>
> I don't have to take any time for this.
>
> I have been listening to this for quite a while. I am denying postconviction relief.

Pet. App. A18.

4. The Louisiana Court of Appeal denied petitioner's application for discretionary review without comment, Pet. App. B1, as did the Louisiana Supreme Court, *id.* at C1.[11]

SUMMARY OF ARGUMENT

This is the latest in a series of cases in which the Orleans Parish district attorney's office has failed to disclose information material to a criminal defendant's guilt or punishment before trial, in violation of the defendant's right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. In this case, the favorable information that the prosecution withheld is remarkable both in its scope and in its materiality. The prosecution's case against petitioner rested entirely on the testimony of a single witness, Larry Boatner, who confidently claimed at trial that, in the course of a few seconds, he saw petitioner's face and thus could identify petitioner as the first man to rush into the house where the shootings at issue occurred. Materials disclosed by the state after trial, however, revealed that Boatner had repeatedly been unable to provide any identifying information to the police. Statements from other witnesses further contradicted Boatner's identification of petitioner. And Boatner's own prior statements revealed other material in-

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[11] The one-year limitations period on petitioner's federal habeas petition was tolled during the pendency of his application for state postconviction relief, but began running again after the Louisiana Supreme Court denied his application for discretionary review. See 28 U.S.C. 2244(d); *Lawrence* v. *Florida*, 549 U.S. 327, 329 (2007). Accordingly, on October 14, 2010, petitioner filed a federal habeas petition in the United States District Court for the Eastern District of Louisiana. That court has stayed further proceedings pending the Court's decision in this case. See *Smith* v. *Cain*, Civ. No. 10-3378, 2011 WL 2682823, at *1 (E.D. La. July 8, 2011).

consistencies that underscored his general unreliability as a witness.

The subsequently disclosed information also included a statement by Phillip Young, one of the presumed perpetrators, that seemingly contradicted the belief of the police and prosecution that petitioner had participated in the murders. Although the principal detective assigned to the case testified at trial that Young had been unable to communicate with him, the detective's handwritten notes disclosed that he had in fact interviewed Young—and that Young had informed him that "Short Dog" (whom police believed to be petitioner) was not with Young at the house where the shootings occurred.

Other subsequently disclosed materials cast substantial doubt on the prosecution's theory of the case: *viz.*, that petitioner was one of the actual shooters. The prosecution solicited testimony from Boatner and a police firearms examiner to establish that petitioner was carrying a 9-millimeter handgun and that all of the 9-millimeter casings at the scene came from that handgun. But subsequently disclosed materials revealed, first, that Boatner had never mentioned a 9-millimeter handgun at any time before trial, and second, that the firearms examiner had previously concluded that the casings came not from a 9-millimeter handgun but instead from a different type of weapon allegedly carried by another perpetrator.

Finally, the prosecution failed to disclose a statement in which Eric Rogers relayed a confession by another individual, Robert Trackling, to the murders. Had that confession been disclosed, the defense could have learned what later came out at the postconviction evidentiary hearing: namely, that a police officer had allegedly encouraged Rogers to implicate petitioner in the shootings.

It is now undisputed that *none* of the foregoing materials was disclosed to the defense before trial. And there can be little dispute that the prosecution's suppression of the materials undermines confidence in the outcome of petitioner's trial. There is surely a reasonable probability that, if the materials had been disclosed, the result of petitioner's trial would have been different. What took place in this case was a miscarriage of justice. Petitioner was denied due process, and he is entitled to a new trial.

ARGUMENT

THE FAILURE OF THE ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE TO DISCLOSE FAVORABLE INFORMATION VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BECAUSE THE INFORMATION WAS MATERIAL TO THE ISSUE OF GUILT

A. Due Process Requires The Prosecution To Disclose Favorable Information Material To The Issue Of Guilt Or Punishment

1. One of the most cherished principles of our criminal justice system is that "[the state's] interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Consistent with the state's "special role * * * in the search for truth in criminal trials," *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), "[i]t is as much [the state's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. Based on that overarching principle, this Court has long held that it violates a defendant's right to due process for the state to withhold favorable evidence that is material to a defendant's guilt or punishment, see *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), or knowingly to use false evidence to procure a

conviction or sentence, see *Giglio* v. *United States*, 405 U.S. 150, 153 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

This case involves application of the rule of *Brady* to a particularly egregious set of facts. And almost fifty years after *Brady* was decided, the governing legal principles are largely settled. As the Court has explained, a defendant asserting a *Brady* claim must satisfy three requirements: first, that "[t]he evidence at issue must be favorable to the accused"; second, that the "evidence must have been suppressed by the State"; and third, that "prejudice must have ensued." *Strickler*, 527 U.S. at 281-282. The Court has repeatedly made clear that the prosecution's responsibility to disclose evidence under *Brady* extends to exculpatory and impeachment evidence alike. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667, 676-677 (1985). A criminal defendant, moreover, need not demand favorable evidence before trial; instead, the prosecution has an "affirmative duty" to disclose any such evidence "regardless of request." *Kyles* v. *Whitley*, 514 U.S. 419, 432-433 (1995). And the rule of *Brady* encompasses evidence "known only to police investigators and not to the prosecutor," *id.* at 438, and applies "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87.

Under *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," and to disclose that evidence *sua sponte* to the defense. *Kyles*, 514 U.S. at 437. To be sure, that obligation requires a prosecutor to "gauge the likely net effect" of favorable evidence *ex ante* and to make a predictive judgment as to whether the failure to disclose the evidence would be prejudicial to the defense. *Ibid.* As the Court has stressed, however, "the govern-

ment simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome." *Id.* at 439. Instead, the Court has admonished that "a prosecutor anxious about tacking too close to the wind" should "disclose a favorable piece of evidence," *ibid.*, and "resolve doubtful questions in favor of disclosure," *United States* v. *Agurs*, 427 U.S. 97, 108 (1976).

2. In its brief in opposition to the petition for certiorari, respondent did not dispute that petitioner has satisfied the first two requirements of *Brady*, and for good reason: petitioner's trial counsel testified at the evidentiary hearing that the relevant documents had not been disclosed to the defense before trial, see p. 22, *supra*, and those documents unquestionably contained abundant evidence favorable to petitioner. As this case comes to the Court, therefore, the sole question is whether the failure to disclose that evidence was prejudicial: *i.e.*, whether the withheld evidence was "material to [the defendant's] guilt or punishment." *Cone* v. *Bell*, 129 S. Ct. 1769, 1782 (2009); see Pet. ii.

As the Court has repeatedly explained, "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, 129 S. Ct. at 1783; see *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 433-434. Under that standard, a defendant need not demonstrate either that "disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal" or that, "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-435. Instead, a "reasonable probability" of a different result exists when the prosecution's suppression of evidence "undermines confidence in the

outcome of the trial": that is, when the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Ibid.* (citation omitted); see *Cone*, 129 S. Ct. at 1783; *Banks* v. *Dretke*, 540 U.S. 668, 698 (2004); *Strickler*, 527 U.S. at 290.

For purposes of this case, three subsidiary principles are also pertinent. First, a court should evaluate the prosecution's suppression of evidence "in the context of the entire record"—and, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient" to satisfy the materiality standard. *Agurs*, 427 U.S. at 112-113. Second, in conducting the materiality inquiry, a court should consider the possibility that, even if a piece of suppressed evidence would not itself have been admissible at trial, it would have led to admissible evidence if it had been produced. See *Wood* v. *Bartholomew*, 516 U.S. 1, 5-6 (1995) (per curiam). Third, because materiality is assessed "in terms of the cumulative effect of suppression," a court should consider the suppressed evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436-437.

Under a faithful application of those principles, this is not a close case. If the extraordinary amount of favorable material had been disclosed before trial rather than withheld, there is a "reasonable probability"—indeed, a high likelihood—that the outcome of petitioner's trial would have been different. The trial court's summary rejection of petitioner's *Brady* claim was erroneous.

B. The Chronic Failure Of The Orleans Parish District Attorney's Office To Disclose *Brady* Information Is Well Documented

Although the principle that it offends due process to convict a defendant based on an incomplete picture of the evidence is now well established, it has not been uni-

versally observed. That is especially true in Orleans Parish, Louisiana, whose district attorney's office has developed an unrivaled reputation for its disregard of *Brady*'s requirements.

This Court is already familiar with the long and disturbing history of *Brady* violations in Orleans Parish during the tenure of district attorney Harry Connick. See, *e.g.*, *Connick* v. *Thompson*, 131 S. Ct. 1350, 1356-1357 (2011); *id.* at 1382 (Ginsburg, J., dissenting) (describing the "culture of inattention to *Brady* in Orleans Parish"). In four cases in which defendants were sentenced to death during Connick's tenure, appellate courts (including, on one occasion, this Court) have found *Brady* violations and overturned the convictions. See *Kyles*, 514 U.S. at 421-422; *State* v. *Bright*, 875 So. 2d 37, 44-45 (La. 2004); *State* v. *Cousin*, 710 So. 2d 1065, 1066 n.2 (La. 1998); *State* v. *Thompson*, 825 So. 2d 552, 557 (La. Ct. App. 2002). In numerous other cases, moreover, appellate courts have vacated non-capital convictions for *Brady* violations. See, *e.g.*, *State* v. *Knapper*, 579 So. 2d 956, 961 (La. 1991); *State* v. *Rosiere*, 488 So. 2d 965, 969-971 (La. 1986); *State* v. *Perkins*, 423 So. 2d 1103, 1107-1108 (La. 1982); *State* v. *Curtis*, 384 So. 2d 396, 398 (La. 1980); *State* v. *Falkins*, 356 So. 2d 415, 417 (La.), cert. denied, 439 U.S. 865 (1978); *State* v. *Carney*, 334 So. 2d 415, 418-419 (La. 1976); *State* v. *Lindsey*, 844 So. 2d 961, 969-970 (La. Ct. App. 2003).

In *Kyles*—decided shortly before petitioner's trial—this Court overturned an Orleans Parish capital conviction based on the prosecution's failure to disclose multiple pieces of exculpatory evidence. See 514 U.S. at 421-422. In so doing, the Court warned prosecutors to err on the side of disclosure in order to avoid *Brady* violations. See *id.* at 439. That warning, however, appears to have gone unheeded in Orleans Parish: when Connick was

asked many years later about the effects of *Kyles* on his office's practices, he responded that he "saw no need, occasioned by *Kyles*, to make any changes." *Connick*, 131 S. Ct. at 1382 (Ginsburg, J., dissenting). Connick's successor as district attorney, Eddie Jordan, confirmed that "[t]he previous administration had a policy of keeping away as much information as possible from the defense attorney." Gwen Filosa, *Jordan Targets Backlog of Cases; Volunteer Lawyers To Pitch In, DA Says*, New Orleans Times-Picayune, Feb. 25, 2003, at A1.

In addition, the lead prosecutor in petitioner's case, Roger Jordan, was sanctioned by the Louisiana Supreme Court for committing the underlying *Brady* violation in *Cousin*, one of the cases in which capital convictions were overturned during Connick's tenure. See *In re Jordan*, 913 So. 2d 775, 782 (La. 2005). The Louisiana Supreme Court noted that it had never previously disciplined a prosecutor for a *Brady* violation. *Id.* at 781. The court observed, however, that the evidence at issue—as in this case, a prior statement by the prosecution's only eyewitness casting doubt on the veracity of that witness's identification—was "clearly exculpatory." *Id.* at 782. The court accordingly suspended Jordan from the practice of law for three months. *Id.* at 784. Notably, Jordan was assigned the case for which he was sanctioned in the summer of 1995, *id.* at 778—roughly the same time he was assigned petitioner's case.

To be sure, the long history of misconduct by the Orleans Parish district attorney's office does not compel reversal of petitioner's convictions, any more than the prior bad acts of a defendant justify a guilty verdict. But even a brief account of that history underscores the need for rigorous enforcement of *Brady*'s requirements when substantial evidence of a violation comes to light. And even by its own standards, the district attorney's office

suppressed an exceptional amount of information in this case that was material to the issue of guilt. As we will now demonstrate, on the facts of this case, a new trial is amply warranted.

C. In This Case, The Orleans Parish District Attorney's Office Suppressed Favorable Information Material To The Issue Of Guilt

The array of favorable information that the Orleans Parish district attorney's office failed to disclose in this case is breathtaking both in its scope and in its exculpatory and impeachment value. That information falls into four primary categories. When the information is considered as a whole, as this Court's jurisprudence requires, there can be no doubt it was material for purposes of *Brady*, because the information "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-435.

1. The District Attorney's Office Suppressed Information Impeaching The Testimony Of The Only Witness Linking Petitioner To The Crime

Most significantly, the district attorney's office suppressed abundant information that could have been used to impeach the testimony of Larry Boatner. That testimony was the "essence of the State's case" at trial, *Kyles*, 514 U.S. at 441 (citation omitted), and was "crucial to the prosecution" because it was the only evidence linking petitioner to the crime, *Banks*, 540 U.S. at 700. As the prosecution conceded in its opening statement, the two other survivors of the shootings "didn't see anybody, so they can't identify anybody, 'cause they were in the back." J.A. 57-58. And as the detective leading the investigation conceded on the stand, there was no forensic evidence associating petitioner with the shootings or

even placing him at the scene: the prosecution did not introduce any DNA or fingerprint evidence, any weapon linked to petitioner, or any other physical evidence. J.A. 139.

a. At trial, Boatner identified petitioner as the first man who had entered the house. J.A. 174-175, 195-196. Boatner repeatedly expressed confidence in his identification: he said he had "[n]o doubt" that petitioner was the first man who had entered the house, because he was "[f]ace to face" with that man and could "[d]efinitely" see his face. J.A. 175-176, 196. In identifying petitioner, Boatner heavily relied on his belief that the first man had a "[m]outh full of gold" and a low-cut haircut. J.A. 186, 196, 200. Boatner also testified that the first man who had entered the house was carrying a silver 9-millimeter handgun, whereas the two other perpetrators carried an AK rifle and a MAC-10 machine pistol. J.A. 178, 180.

On three separate occasions, however, Boatner had provided "vastly different" statements to the police in which he unambiguously asserted that he was unable to identify any of the perpetrators. *Kyles*, 514 U.S. at 442. When Officer Ronquillo interviewed Boatner at the scene, Boatner stated that he "could not * * * supply a description of the perpetrators other th[a]n they were black males." J.A. 252-253. All that Boatner could tell Ronquillo was that the perpetrators were carrying an AK rifle, a TEC-9-type weapon, and a silver handgun of unspecified size. J.A. 252. Although a certain degree of imprecision might be expected from a witness in the immediate aftermath of a violent incident, Ronquillo testified that, at the time, Boatner appeared to be "coherent" and "articulated very well the events that had transpired." J.A. 137.

In addition, five days later, Boatner again told Officer Ronquillo that he "could not ID anyone because [he] couldn't see faces." J.A. 308. According to Ronquillo's notes, Boatner had only "glanced" at the first man who had entered the house, "c[ould]n't tell" if the men had their faces covered, and "didn't see anyone." *Ibid.* In conclusion, Boatner said, he "could not ID" the men and "would not know them if [he] saw them." *Ibid.* Seemingly later that same day, Boatner told Ronquillo yet again that he "could not identify any of the perpetrators of the murder." J.A. 260. At most, he said, he could "identify the car if the motor was running." *Ibid.*

It is simply impossible to reconcile those prior statements, in which Boatner repeatedly denied that he could identify any of the perpetrators, with his confident identification of petitioner at trial. The statements therefore constitute the epitome of impeachment evidence: if the defense had been provided those statements, it inevitably would have used them in cross-examining Boatner, and Boatner "would have had trouble explaining" how those statements could be squared with his testimony that there was "[n]o doubt" he saw petitioner at the scene. *Kyles*, 514 U.S. at 441.

There is more. The prosecution withheld not only the notes recording Boatner's prior statements, but also the notes from interviews of two other witnesses who provided information undermining Boatner's identification of petitioner. According to those notes, Shelita Russell, who was critically injured in the shootings and later died, indicated to the police that the "first one through [the] door" had a "black cloth across [his] face." J.A. 310. Russell's statement would have been admissible at trial as a dying declaration, because there was evidence that she made the statement believing her death was imminent. See La. Code Evid. Ann. art. 804(A), (B)(2) (2006

& Supp. 2011); J.A. 102. And it directly contradicted testimony by Officer Joseph Narcisse, who told the jury that Russell had not provided "any further details about the incident" aside from her name, address, and date of birth. J.A 72-73. Similarly, Dale Mims, a neighbor (and the only witness who was not in the house at the time), told the police that, immediately after the shooting, he saw a group of men exit the house, "[a]ll" of whom were wearing "ski type" masks that "cover[ed] [the] whole face." J.A. 309. If the defense had been aware of that statement, it could have called Mims to testify at trial (as he did at the postconviction evidentiary hearing, J.A. 402-417).

Because Russell's and Mims's prior statements indicate that the first man who had entered the house was wearing a mask, they would have had considerable value in calling into question Boatner's assured identification of petitioner as that man. Particularly when considered in conjunction with Boatner's own prior statements, those accounts would likely have generated substantial doubts in the jury's mind about the accuracy of Boatner's identification—the linchpin of the prosecution's case against petitioner.

b. The suppressed information is all the more clearly material because Boatner's identification was "already of questionable validity." *Agurs*, 427 U.S. at 113. By his own account, Boatner had just "[s]econds" to see the perpetrators, who "rushed in" when he opened the front door and almost immediately forced him and the others to the ground. J.A. 174-177, 199. In addition, in identifying petitioner, Boatner heavily relied on his belief that the first man had a "[m]outh full of gold" and a low-cut haircut—a belief that Boatner had conveyed on one previous occasion to the police. J.A. 186, 196, 200, 296. But those characteristics could hardly have been sufficient to

sustain an identification in and of themselves, because they were not uncommon for the time and place. Indeed, according to other undisclosed materials, no fewer than *five* other suspects (including Phillip Young, Donielle Bannister, and Kintad Phillips) had gold teeth and similar haircuts. J.A. 259, 264, 284, 298. Those characteristics therefore constituted an insufficient basis for Boatner's in-court identification of petitioner.

To the extent Boatner had previously identified petitioner as the first man who had entered the house, the circumstances surrounding that earlier identification were equally dubious. Boatner claimed to have first identified petitioner on or around June 7, 1995, after seeing an article about the case in the New Orleans Times-Picayune. J.A. 187-190. As the court noted at trial, however, that article was accompanied by a photograph of petitioner and implicated him as one of the "primary suspects" in the shootings. J.A. 160-161. In addition, Boatner took no action to alert the police to his alleged identification; instead, he left town and, upon his return, checked into a rehabilitation program at a local hospital for patients with "life-threatening" substance-abuse problems. J.A. 190-193, 213-214, 218, 245. It was only at the hospital—almost four months after the shootings, and some three weeks after he allegedly had first identified petitioner—that Boatner was visited by the police and identified petitioner from a photographic lineup. J.A. 193-194. Contemporaneous notes by a hospital aide, moreover, reveal that Boatner had felt "harassed" by the police to identify a suspect. J.A. 247. Boatner's purported prior identification of petitioner thus provides scant support for his confident in-court identification. And given the "questionable validity" of Boatner's identification of petitioner, even "relatively minor" impeachment evidence would suffice to undermine it, *Agurs*, 427

U.S. at 113—much less the overwhelming evidence that the prosecution here suppressed.

c. In addition to undermining Boatner's identification, the suppressed information reveals other inconsistencies in Boatner's trial testimony—inconsistencies that would have cast doubt on Boatner's credibility as a witness more generally.

For example, Boatner testified at trial that the first man who had entered the house was carrying a silver 9-millimeter handgun. J.A. 178. In his numerous prior statements, however, Boatner nowhere described the handgun as a 9-millimeter; instead, he merely referred to the gun generically as a "silver colored handgun" or a "chrome automatic." J.A. 252, 296. Given Boatner's testimony at trial that he "kn[e]w" what a 9-millimeter handgun "looks like," J.A. 178, Boatner's consistent failure to identify the gun as a 9-millimeter before trial would have served as a valuable basis for impeachment.

In one of his prior statements, Boatner also described the handgun carried by the first man who had entered the house as "big." J.A. 296. In his trial testimony, however, Boatner did not so describe the gun, instead referring to it only as a 9-millimeter handgun. J.A. 178. That inconsistency is particularly significant when it is understood in conjunction with other trial testimony, because it casts further doubt on the validity of Boatner's ultimate identification of petitioner. At trial, Rebe Espadron testified that the sole perpetrator she saw—the man who had pointed the gun at her—was carrying a "big gun, like a big handgun." J.A. 110. Espadron also testified that she was unable to see that man's face because he had something covering his mouth. J.A. 99, 110. If Boatner had been confronted with his prior statement that the handgun carried by the first man who had entered the house was "big," the jury would likely have

wondered whether the man he was describing was the same man who had pointed a "big" handgun at Espadron—and, if so, whether Boatner was being accurate when he testified that he had seen that man's face, despite Espadron's testimony that the man she saw had his mouth covered (testimony consistent with the undisclosed statements of Russell and Mims).

There were still more inconsistencies between Boatner's trial testimony and the suppressed information. To take but two further examples, Boatner told the jury that the third perpetrator he had observed was carrying a MAC-10. J.A. 180. In his prior statements, however, Boatner nowhere mentioned a MAC-10; instead, he repeatedly told investigators that the third perpetrator carried a TEC-9—which has a noticeably different appearance from the MAC-10. J.A. 252, 296.[12] That discrepancy would have served as another basis for impeachment, particularly in light of Boatner's testimony that he "kn[e]w all about" the guns the perpetrators had been carrying. J.A. 201. In addition, Boatner told the jury that there had been three perpetrators. J.A. 180. In his prior statement, however, Dale Mims told the police he had seen four. J.A. 309.[13]

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[12] On a MAC-10, the magazine inserts into the grip handle itself, behind the trigger; on a TEC-9, the magazine attaches separately, forward of the trigger guard. The MAC-10 thus has only one protrusion extending downward from the barrel, whereas the TEC-9 has two. See, *e.g.*, Violence Policy Center, *The Gun Industry Evades the Assault Weapons Ban* <tinyurl.com/gunpicture> (last visited Aug. 12, 2011).

[13] At the postconviction hearing, Boatner himself admitted that "d[id]n't know how many [perpetrators] was in there"—only that there were "two, for sure." J.A. 477.

To the extent there is any residuum of doubt whether the suppressed information directly impeaching Boatner's identification of petitioner satisfies *Brady*'s materiality standard, therefore, the numerous additional inconsistencies in Boatner's testimony eliminate it. In the hands of petitioner's experienced counsel, the undisclosed materials would have "fueled a withering cross-examination" of Boatner and "resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Kyles*, 514 U.S. at 441, 443.

d. It bears repeating that, aside from Boatner's identification, *there was no evidence linking petitioner to the crime*. This case therefore crucially differs from ones in which "[o]ther evidence in the record * * * [would] provide[] strong support for the conviction even if the witness' testimony had been excluded entirely." *Banks*, 540 U.S. at 701 (citing *Strickler*, 527 U.S. at 293). For example, in *Strickler*, the testimony of the witness who could have been impeached "was not the only evidence that the jury had before it," and "there was considerable forensic and other physical evidence linking [the defendant] to the crime." 527 U.S. at 293. By contrast, far from being "overwhelming," *Wood*, 516 U.S. at 8, the other evidence linking petitioner to the crime in this case was nonexistent.

Indeed, the prosecution's case against petitioner was far weaker—and more dependent on evidence undercut by the suppressed information—than in other cases in which this Court has *found* violations of a defendant's right to due process. In *Kyles*, the prosecution's case included four eyewitness identifications and the murder weapon, which had been found in the defendant's home. See 514 U.S. at 427-428, 431; *id.* at 475 (Scalia, J., dissenting) (contending that the prosecution had "presented to the jury a massive core of evidence * * * showing

that petitioner was guilty of murder"). The Court nevertheless concluded that the disclosure of inconsistent statements by two of the eyewitnesses and a police informer "would have made a different result reasonably probable." 514 U.S. at 441. Similarly, in *Banks* (which involved a claim of *Brady* error in capital sentencing), the jury heard uncontradicted testimony that the defendant had killed the victim "for the hell of it"; had supplied a weapon to another person for the purpose of carrying out robberies; and had threatened to kill a relative a week before the murder in question. See 540 U.S. at 677, 679-681. But the Court concluded that the disclosure of a witness's status as an informant made it reasonably probable that the jury would have imposed a lesser sentence. *Id.* at 703.

At bottom, this case is far simpler. The prosecution's case hinged entirely on the testimony of a single witness. That testimony, in turn, was thoroughly undermined by inconsistent and contradictory statements made by that witness and others to the police—statements that the prosecution failed to disclose to petitioner before trial. If those statements had been made available, the defense would have laid waste to the witness's testimony on cross-examination, "destroying confidence in [the witness's] story" and taking down the prosecution's case with it. *Kyles*, 514 U.S. at 443; see *Napue*, 360 U.S. at 269 (noting that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"). Based on the abundant evidence impeaching that witness's testimony alone, "one could not plausibly deny the existence of the requisite 'reasonable probability of a different result,'" and petitioner is accordingly entitled to a new trial. *Banks*, 540 U.S. at 703 (citation omitted).

2. The District Attorney's Office Suppressed Information From An Apparent Perpetrator Suggesting That Petitioner Had Not Been Involved In The Crime

Although the suppression of the information that could have been used to impeach Boatner is itself sufficient to warrant a new trial, the district attorney's office also suppressed police notes indicating that Phillip Young, who was suspected of (and later charged with) being one of the perpetrators of the shootings, had provided information suggesting that petitioner was not involved. Far from disclosing that statement, the prosecution affirmatively created the misleading impression that Young had been unable to communicate with police. The failure to disclose the notes recording Young's exculpatory statements further "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (citation omitted).

a. At trial, the prosecution presented substantial evidence that Young was one of the perpetrators: Young had been found critically wounded at the scene, and Espadron and Boatner both testified that they had never seen him before and expressed their belief that he was involved in the shootings. J.A. 103, 114, 182-183. At the same time, the prosecution suggested that Young had been unable to provide any information concerning petitioner's involvement in the shootings. Officer Ronquillo testified that he had visited Young at the extended-care facility where he was being treated for his injuries. J.A. 135. According to Ronquillo, Young was in "really bad shape" and was not "able to communicate with [him] at all." J.A. 135-136.

Unbeknownst to the defense, however, Officer Ronquillo *had* been able to communicate with Young, who provided significant information concerning the shoot-

ings. According to police notes, Officer Ronquillo visited Young after receiving a call from Young's nurse informing him that Young "had begun talking and communicating with others." J.A. 271-272. Although Young's speech was "very slurred," he could answer yes-or-no questions by blinking. J.A. 272.[14] According to the police notes, after Ronquillo administered the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), Young answered a series of questions concerning the shootings. J.A. 311. Most importantly, when Ronquillo asked Young whether certain individuals (including "Short Dog") were with him when he went to the house where the shootings occurred, Young answered no. *Ibid.*

At the time, the police believed "Short Dog" to be petitioner. According to police notes, "Short Dog" was listed as petitioner's alias. J.A. 312. At the postconviction hearing, moreover, petitioner's trial counsel testified that the police had referred to petitioner as "Short Dog." J.A. 365.

b. It can hardly be disputed that the fact that Young had denied the involvement of "Short Dog" in the shootings would have been material to a jury determining petitioner's guilt. If the defense had been aware of that fact, it could have called Young to testify at trial. If Young had been unable or unwilling to testify, the defense could have introduced Young's statement as a statement against interest by an unavailable witness. See La. Code Evid. Ann. art. 804(A), (B)(3) (2006 &

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[14] At the postconviction hearing, Barbara Riley, Young's nurse, confirmed that Young could answer yes-or-no questions through body movement; "appeared to understand what you were saying to him"; and was not suffering from amnesia. J.A. 421, 424.

Supp. 2011).[15] Not only was Young's statement powerful exculpatory evidence on its own, but the defense could have used it in cross-examining Officer Ronquillo: for example, to impeach Ronquillo's testimony that Young was not "able to communicate with [him] at all," J.A. 136; to verify that the police believed that "Short Dog" was petitioner; and to explore the police's reasons for so believing.

However the information would have been introduced, if the notes of Officer Ronquillo's interrogation of Young had been produced before trial, the jury would have been privy to a statement by an apparent perpetrator seemingly absolving petitioner of responsibility for the shootings. Particularly when that information is combined with the information undermining Boatner's identification of petitioner as one of the perpetrators, "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, 129 S. Ct. at 1783.

3. ***The District Attorney's Office Suppressed Information Undermining The Prosecution's Theory Of The Case***

The prosecution in this case withheld information casting doubt not only on petitioner's presence at the scene of the shootings, but also on the prosecution's very

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[15] To the extent that Young's statement tended to inculpate him at the same time as it exculpated petitioner, it would have been admissible because there were other indicia of the statement's trustworthiness: specifically, because Young's answers to other questions (*e.g.*, that he had driven to the house in his girlfriend's car and that he had been shot by one of the people in the house) were consistent with other evidence in the case. See La. Code Evid. Ann. art. 804(B)(3) (2006 & Supp. 2011); J.A. 300-303.

theory of the case: *viz.*, that petitioner was one of the actual shooters. Specifically, the withheld information contradicted the proposition that, assuming that Larry Boatner's identification of petitioner was accurate, at least one of the victims was shot and killed by a bullet fired from the 9-millimeter handgun purportedly carried by petitioner. Together with the other suppressed information, that information—pertinent to one of the central issues at trial—is material for purposes of *Brady*.

a. At trial, the prosecution went to great lengths to prove that petitioner was one of the shooters.[18] The prosecution's theory, in turn, had three components. First, the prosecution sought to establish that petitioner, and no other perpetrator, carried a 9-millimeter handgun. To that end, Boatner testified that the first man who had entered the house—allegedly petitioner—was carrying a silver 9-millimeter handgun, whereas the two other perpetrators were carrying an AK rifle and a MAC-10 machine pistol. J.A. 178, 180. The prosecution sought to bolster Boatner's credibility in identifying the firearms by eliciting testimony that Boatner "kn[e]w" what a 9-millimeter handgun "looks like" and that he "kn[e]w all about" the other weapons as well. J.A. 178, 201.

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[18] The prosecution seemingly relied on that theory for purposes of establishing that petitioner had a "specific intent to kill or to inflict great bodily harm," as is required under Louisiana law in order to obtain a conviction for first-degree murder. See La. Rev. Stat. Ann. § 14:30(A) (2007 & Supp. 2011); cf. La. Rev. Stat. Ann. § 14:10(1) (2007) (defining "[s]pecific criminal intent" as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act").

Second, the prosecution sought to establish that the 9-millimeter casings found at the scene came exclusively from a 9-millimeter handgun. The prosecution did so through the testimony of Kenneth Leary, a police firearms examiner. Leary stated that, "[a]fter examining all 26 of * * * the 9-millimeter cartridge cases, [he] was able to reach the conclusion that all 26 cartridge cases w[ere] fired by one particular weapon, one 9-millimeter handgun." J.A. 155.

Third, the prosecution sought to establish that at least one of the victims was shot and killed by a bullet fired from a 9-millimeter handgun. The prosecution asked Alvaro Hunt, the pathologist who had performed Shelita Russell's autopsy, whether Russell's wounds were "consistent with gunshots from a 9 millimeter handgun." Hunt answered, "[t]hey could be, yes," though he conceded that he could not be certain. J.A. 79-81.

Undisclosed materials cast serious doubt on the validity of at least two components of the prosecution's theory. As discussed above, in his numerous prior statements, Boatner never once described the handgun carried by the first man as a 9-millimeter; instead, he referred to the gun only as a "silver colored handgun" or a "chrome automatic." See p. 39, *supra*. Despite his confident assertion that he "kn[e]w" what a 9-millimeter handgun "looks like," Boatner did not describe the handgun as a 9-millimeter until trial. J.A. 178.

Even more significantly, undisclosed police notes demonstrate that, although Leary testified at trial that all of the 9-millimeter casings found at the scene came from one 9-millimeter handgun, he had told Officer Ronquillo something quite different in the course of the investigation. According to those notes, Ronquillo asked Leary to conduct testing to determine whether the 9-

millimeter casings found at the scene matched a 9-millimeter handgun that had been seized from Donielle Bannister when he was arrested on another charge. J.A. 266. Leary, however, responded that the 9-millimeter casings had already been matched to "a Inter Tec, 'Mac 11' model type, semi automatic weapon." *Ibid.* Because Leary had already determined that the casings came from that type of weapon, he did not conduct the testing of the 9-millimeter handgun that Ronquillo had requested. *Ibid.*

b. The notes of Leary's conversations with Officer Ronquillo squarely contradict Leary's testimony at trial—and, in so doing, directly undermine the prosecution's theory of the case. Leary's statement that the 9-millimeter casings had been matched to a machine pistol of the Intratec or MAC-11 type cannot be reconciled with his trial testimony that they came from a 9-millimeter handgun: although they also use 9-millimeter cartridges, machine pistols such as the Intratec TEC-9 and Ingram MAC-10 and MAC-11 are automatic or semiautomatic weapons, not handguns.[17] Indeed, Leary was so sure that the casings did not come from a 9-millimeter handgun that he refused to conduct testing to determine whether the casings matched a 9-millimeter handgun that the police had seized. In addition, at least according to Boatner, an "Inter Tec, 'Mac 11' model type" weapon *was* on the scene—but it was carried by a

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[17] See Jones & White 221; cf. *United States* v. *Miles*, 772 F.2d 613, 615 (10th Cir. 1986), cert. denied, 476 U.S. 1158 (1986); *Navegar, Inc.* v. *United States*, 914 F. Supp. 632, 633-634 & n.2 (D.D.C. 1996), aff'd in part and rev'd in part, 103 F.3d 994 (D.C. Cir. 1997); *Merrill* v. *Navegar, Inc.*, 28 P.3d 116, 119 & n.3 (Cal. 2001); see generally Duncan Long, *The Terrifying Three: Uzi, Ingram, and Intratec Weapons Families* 21-58 (1989).

different perpetrator, whom Boatner variously described as carrying a TEC-9 (a machine pistol manufactured by Intratec), J.A. 252, 296, or a MAC-10 (a slightly larger version of the MAC-11), J.A. 180.

If the defense had been aware of the prior statements by Boatner and Leary, it surely would have used those statements on cross-examination to attack the prosecution's theory of the case. And based either on Boatner's failure to mention the 9-millimeter handgun before trial or on Leary's pretrial statement that the 9-millimeter casings found at the scene came not from a 9-millimeter handgun but instead from a different type of weapon purportedly carried by another perpetrator, the jury readily could have concluded that petitioner was not one of the shooters—assuming, *arguendo*, that the jury would have concluded that petitioner was even present at the scene in the first place.

In short, Boatner's and Leary's prior statements thoroughly undercut the prosecution's theory of the case, and the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Particularly when coupled with the suppressed evidence concerning whether petitioner was even present at the scene, that evidence is material for purposes of *Brady*.

4. *The District Attorney's Office Suppressed Information Indicating That Other Individuals Were Responsible For The Shootings*

Finally, the district attorney's office suppressed the confession of another individual, Robert Trackling, to participation in the shootings. If the notes of the interview recording that confession had been disclosed before trial, the defense could have used them to exculpate peti-

tioner—and, indeed, to develop the argument that the police had framed petitioner for the shootings.

a. Eric Rogers, Trackling's cellmate, told Officer Byron Adams that Trackling had confessed to the Roman Street murders. J.A. 281-282. According to Rogers, Trackling said that he had committed the murders with three others: "Fat, Buckle and a guy they call uh, Short Dog." J.A. 281. When Officer Adams asked Rogers to identify those individuals, Rogers immediately identified "Fat" as "Darnell Ban[n]ister" (presumably Donielle Bannister) and "Buckle" as "Contez Phillips" (presumably Kintad Phillips). J.A. 284. As to "Short Dog," however, Rogers gave conflicting answers. Rogers initially said that Trackling had told him that "Short Dog" was "Juan" (but that Trackling "didn't give [him] no last name"), but later, when asked whether the three men "call themselves anything," he said, "Short Dog that's what they call him, they call Robert Home." J.A. 285. Rogers then said the men were members of a group that called itself the "Cut Throat Posse"—but when he listed the members of the group by name, he did not list petitioner. J.A. 285-287.

Officer Adams relayed the contents of the interview to Officer Ronquillo, who subsequently conducted an interview with Trackling. J.A. 266-267, 275. Trackling asserted his right to remain silent but offered an unsolicited statement that he had been working at a pizza shop on the night of the shootings. J.A. 275. That alibi, however, did not check out: Trackling's time card showed that he had left work before the shootings occurred. J.A. 248, 277.

b. The notes recording Rogers's and Trackling's statements before trial would have been materially helpful to the defense in two respects.

First, to the extent that Rogers's equivocal statement cast doubt on the proposition that "Short Dog" was petitioner, Trackling's statement would have been affirmatively exculpatory as to petitioner, given Trackling's identification of "Short Dog" as one of the perpetrators. If the defense had possessed Rogers's and Trackling's statements, it could have called them to testify at trial. If Trackling had refused to testify, the defense could have introduced Trackling's statement through Rogers as a statement against interest by an unavailable witness. See La. Code Evid. Ann. art. 804(A), (B)(3) (2006 & Supp. 2011).[18]

Second, if the defense had been aware of Rogers's statement relating Trackling's confession, defense counsel (or the private investigator the defense had retained) could have spoken to Rogers and learned of Rogers's bombshell allegation that Officer Adams had asked him to implicate petitioner. At the postconviction hearing, Rogers testified that Adams had spoken with him before Adams began recording his statement. J.A. 435.[19] In that conversation, according to Rogers, Adams asked Rogers if he knew a "Short Dog" or petitioner; Rogers said he did not. J.A. 430. At that point, Adams "asked [him] to involve Short Dog, Juan Smith," and promised

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[18] To the extent that Trackling's statement tended to inculpate him at the same time as it exculpated petitioner, it would have been admissible because there were other indicia of the statement's trustworthiness: specifically, because Trackling's statement contained numerous details that were verified by other witnesses (such as Rebe Espadron). See La. Code Evid. Ann. art. 804(B)(3) (2006 & Supp. 2011); J.A. 98-100.

[19] That testimony was consistent with the transcript of Rogers's recorded statement, in which Officer Adams referred to an "oral interview" that had taken place earlier. J.A. 286.

him that, if he "d[id] [Adams] a favor," Adams "would go talk to some people and get [his] life sentence took back." *Ibid.* Under persistent questioning, Rogers consistently maintained that Adams "wanted [him] to implicate Juan Smith[,] saying that Juan Smith was the shooter," J.A. 433, and that Adams promised to help him "get [his] time took back" if he implicated petitioner, J.A. 443.

There is good reason to credit Rogers's version of events. At trial, Officer Ronquillo testified that he first identified petitioner as a suspect in the Roman Street shootings in late May 1995, but he did not explain how he came to do so. J.A. 131. At the postconviction hearing, however, Officer Ronquillo was more forthcoming, testifying that he had identified petitioner as a suspect only after speaking with Officer Adams, who relayed the contents of his interview with Rogers. J.A. 525-527. Prior to that conversation, Ronquillo conceded, he had not investigated petitioner. J.A. 552, 555. Notably, at that time, Ronquillo had not yet spoken to Trackling, and Boatner had not yet identified petitioner. There was therefore no basis for suspecting petitioner of involvement in the Roman Street shootings apart from Adams's account of his interview with Rogers.

Various features of Rogers's statement, moreover, are consistent with his contention that he had never believed that petitioner was "Short Dog" but had been asked by Officer Adams to implicate petitioner as "Short Dog" shortly before the statement was recorded. Although Rogers was immediately able to identify "Fat" and "Buckle" as associates whom Trackling identified as participants in the shootings, Rogers hesitated upon mentioning "a guy they call uh, Short Dog." J.A. 281. When Adams asked Rogers to identify those individuals, Rogers again immediately identified "Fat" and "Buckle," but was unable to put a consistent name to "Short

Dog"—at first calling him "Juan" but later failing to make the same association. J.A. 285. And in naming the members of the "Cut Throat Posse," Rogers conspicuously failed to mention petitioner. J.A. 285-287. Rogers was therefore far from confident in implicating petitioner in the shootings—a lack of confidence that tends to confirm Rogers's account of how he came to be aware of petitioner in the first place.

In any event, Rogers's contention that the police had sought to frame petitioner would readily qualify as information that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. If the defense had learned of Rogers's contention, it could have called Rogers to testify at trial—or, at a minimum, cross-examined Officer Ronquillo about how petitioner came to be identified as a suspect. As with other suppressed evidence, Rogers's statement would have enabled the defense to obtain information that would have undercut the "thoroughness and even the good faith" of the investigation and prosecution, dramatically weakening the prosecution's already threadbare case against petitioner. *Id.* at 445.

In sum, when the foregoing statements by Rogers and Trackling are considered together with the abundant other information that the state withheld, there can be no doubt that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, 129 S. Ct. at 1783. The failure to disclose any of that information compels a new trial.

* * * * *

This Court has often observed that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). As in *Kyles*, however, "'fairness' cannot be stretched to the point of calling this a fair trial." 514 U.S. at 454. The prosecution's case against petitioner depended on a single witness whose testimony was inconsistent with numerous undisclosed statements he and others had previously provided to the police. An undisclosed statement by an apparent perpetrator seemingly denied petitioner's involvement. The prosecution's whole theory of the case was contradicted by an undisclosed statement by its own firearms examiner. And an undisclosed jailhouse confession revealed an unsettling explanation for petitioner's presence in the case in the first place. In light of the systematic withholding of favorable information by the Orleans Parish district attorney's office in this case, it is simply impossible to have confidence in the outcome of petitioner's trial.

One final observation is in order. The unfairness of petitioner's trial was compounded by the summary treatment that his *Brady* claim received in the Louisiana courts. Without issuing a written ruling or making any findings of fact or conclusions of law, the trial judge summarily rejected petitioner's claim from the bench, dismissively stating that he "ha[d] been listening to this for quite a while" and "d[id]n't have to take any time for this." Pet. App. A18. The Louisiana appellate courts then denied petitioner's applications for discretionary review. See *id.* at B1, C1. To be sure, state courts are busy places, and "[t]he issuance of summary dispositions * * * can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Harrington* v. *Richter*, 131 S. Ct. 770, 784 (2011). But we

respectfully submit that it is inappropriate for state courts to issue such summary rulings in the face of what is indisputably a substantial claim for postconviction relief. Petitioner was the victim of a miscarriage of justice at trial and of rough justice thereafter. Under established principles of due process, petitioner is entitled to a new, fair trial.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

ORD
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EFS

No. 10-8145

In The

Supreme Court of the United States

JUAN SMITH,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The Orleans Parish Criminal District Court Of Louisiana

RESPONDENT'S BRIEF

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QUESTION PRESENTED

A small group of friends gathered in the front room of a home. Hearing a disturbance outside, one of the friends opened the front door. Armed men burst in, demanding drugs and money. The friend who opened the door was held standing at gunpoint. The others were ordered to the floor. After an exchange of words, the first intruder struck the standing victim in the head, causing a severe laceration. The victim fell and pretended to be unconscious. The intruders opened fire, executing five of the friends. Only the victim who opened the door survived.

At the scene, the victim provided a first-responding officer with a physical description of the perpetrator who had pointed the gun in his face. While still in the house, standing among the bodies of his friends, and bleeding from his head, the victim provided a second officer with a description of the weapons used in the murders, but stated he could not supply a description of the perpetrators other than that they were black males. Four hours later, after being treated for his head wound, the victim was taken to the Homicide Office, where he provided a formal statement. The formal statement included a physical description of the perpetrator who had pointed the gun in his face as well as the weapons used in the murders. Five days later, when asked by the police if he could identify any of the perpetrators, the victim stated he could not.

QUESTION PRESENTED – Continued

Over the course of the next three months, the victim viewed fifteen photographic lineups from which he identified only one person – petitioner. Petitioner was indicted. At trial, the victim pointed to petitioner as the man who burst into the home and pointed a gun in his face. Petitioner was convicted of five counts of first-degree murder.

Whether the victim's undisclosed pretrial statements undermine confidence in the outcome of petitioner's trial such that petitioner was denied due process under this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases.

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STATEMENT OF THE CASE

I. Proceedings Prior To Trial

Petitioner and co-defendant, Phillip Young, were indicted on August 31, 1995, for five counts of capital murder in connection with the March 1, 1995 shooting deaths of five individuals inside a residence at 2230 North Roman Street in New Orleans, Louisiana.[1] In the same indictment, petitioner and three co-defendants were charged with three counts of capital murder relating to the February 5, 1995 shooting deaths of three individuals inside a home on Morrison Road in New Orleans.[2] Criminal District Court Record ("C.D.C.R."), 1A-L, 2. The two incidents were severed.

A. Petitioner's Motion for Discovery and the *In Camera* Inspection of Disputed Documents Requested in Petitioner's Motion for Discovery

On September 12, 1995, petitioner moved for discovery. J.A. 32-34. The State's reply included the initial police report as an attachment. J.A. 33. The

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[1] Although Petitioner was subsequently brought to trial, Young was not. Young was found by the district court to be an incompetent and "will never be able to assist his counsel in trial due to perm[a]nent brain damage" sustained during the commission of the murders. J.A. 1.

[2] Petitioner was convicted of these murders on December 5, 1996, and sentenced to death on each count. See *State v. Smith*, 793 So.2d 1199 (La. 2001).

supplemental report was requested, but not disclosed.[3]

On October 31, 1995, the court conducted an *in camera* inspection of police reports for *Brady* material. After the inspection, the court ordered that the initial report be turned over to the defense and found that the supplemental report relating to the North Roman Street murders "contain[ed] no *Brady* [material]." Oct. 31, 1995 Motion Hearing Transcript, 20-21.

B. The Hearing on the Motion to Suppress Identification

Three witnesses testified at an October 27, 1995 hearing on petitioner's motion to suppress identification: Detective John Ronquillo, the lead homicide detective assigned to investigate the North Roman Street murders, and eyewitness Larry Boatner, testified for the State. Janie Mills, a psychiatric aide at Charity Hospital, testified for the defense.

Ronquillo testified that, on the afternoon of June 28, 1995, he met with Boatner at Charity Hospital, where Boatner was undergoing treatment for alcohol

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[3] Louisiana law specifically excludes "the discovery or inspection of reports, memoranda or other internal state documents made by the district attorney or by agents of the state in connection with the investigation or prosecution of the case; or of statements made by witnesses or prospective witnesses, other than the defendant, to the district attorney, or to agents of the state." LA. CODE CRIM. PROC. art. 723.

abuse. 2000-KA-1392, Vol. 7, Oct. 27, 1995 Motion Hearing Transcript ("Mot. Hrg. Tr."), 3, 6. When presented with the first of three photographic lineups, Boatner immediately identified petitioner's photograph.[4] Mot. Hrg. Tr. 4. Ronquillo described Boatner's identification as "very positive." Mot. Hrg. Tr. 14. After Boatner's identification of petitioner, Ronquillo presented Boatner with two additional lineups. Mot. Hrg. Tr. 4, 9-10, 13-14. Boatner identified no one in either of those lineups. Mot. Hrg. Tr. 4, 9.

Larry Boatner's testimony confirmed Ronquillo's testimony. Mot. Hrg. Tr. 16-21. In addition, Boatner testified that he had made no formal identifications prior to that of June 28, 1995. Mot. Hrg. Tr. 21-22. He also testified that, on a previous occasion, he had been shown a lineup in which he noted a photograph of "a guy that had a look on his face and his haircut [sic] the same way" as petitioner. Mot. Hrg. Tr. 22. He added that he had merely noted the similarity without making any identification. Mot. Hrg. Tr. 22.

Boatner also testified that while still on the scene of the murders he gave a description of his assailant to a police officer who was not Ronquillo. Mot. Hrg.

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[4] Respectively, these were the thirteenth, fourteenth, and fifteenth lineups prepared by Ronquillo and shown to Boatner during the course of the investigation of the North Roman Street murders. J.A. 132-34. Lineup thirteen included a photograph of petitioner. J.A. 268. Lineup fifteen included a photograph of Robert Trackling, one of petitioner's co-defendants in the Morrison Road murders. J.A. 269; C.D.C.R. 1G-L, 2.

Tr. 23. To that officer Boatner described his assailant as "heavy built with his hair with a fade, with a little small top with a lot of gold teeth in his mouth." Mot. Hrg. Tr. 24.

Janie Mills testified that she worked as a "treatment person" for Boatner while he was on the psychiatric ward at Charity Hospital. Mot. Hrg. Tr. 31. She testified that she escorted Boatner to a meeting with a policeman during which Boatner was shown photographs. Mot. Hrg. Tr. 33. Mills further testified that she witnessed Boatner make a positive identification. Mot. Hrg. Tr., 33-34.

II. The Proceedings At Trial

A. Reopening of the Motion to Suppress Identification

Petitioner's two-day trial for the North Roman Street murders began on December 4, 1995. 2000-KA-1392, Supp. Vol., Trial Transcript ("T. Tr."), 2-A. During the State's opening, defense counsel raised an objection to a comment that Boatner had seen a picture of petitioner in the June 7, 1995 edition of the Times Picayune newspaper prior to making his identification of petitioner. T. Tr., 11. The objection prompted the district court to reopen the hearing on petitioner's motion to suppress identification. J.A. 42. As the district court judge put it, "The essential reason for the reopening of the motion to suppress was to ask . . . what [Boatner] saw in the newspaper and how that affected [his identification]." J.A. 42.

Asked whether he had read the article, Boatner testified he had not. J.A. 42. Rather, Boatner testified he had received a telephone call from a friend informing him that the suspected perpetrators of the Morrison Road murders had been apprehended, that those perpetrators may also have been responsible for the North Roman Street murders, and that photographs of the perpetrators appeared in a newspaper article. J.A. 42-43. At his friend's suggestion, Boatner obtained the article. J.A. 43-44. Upon looking at the four photographs that accompanied the article and recognizing petitioner as the man who assaulted him, he called his friend back to inform him. J.A. 44, 52-53. After Boatner's testimony, counsel presented argument, the district court again denied the motion to suppress the identification, and opening arguments resumed.[5] J.A. 45-57.

B. Testimony

Continuing with trial, the State offered the testimony of, among others, the following witnesses: Officer Joseph Narcisse; Rebe Espadron; Larry Boatner; Detective John Ronquillo; and Officer Kenneth Leary. The defense called one witness: Patrick Kent, a psychologist.

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[5] Petitioner raised the issue of suggestibility in the direct appeal of his conviction to the appellate courts of Louisiana and to this Court, all of which rejected his claim.

1. Officer Joseph Narcisse

Officer Joseph Narcisse was among the first to respond to the scene on North Roman Street. On direct examination, he testified that at 8:33 p.m. on the evening of March 1, 1995, he and his partner received a call dispatching them to the scene of a reported shooting and aggravated burglary, approximately four or five blocks from their position at the time. J.A. 58-59. Upon arriving at the scene, Narcisse encountered a "very, very, terribly hysterical" Rebe Espadron outside the house, still clutching the cordless phone she had used to call for help. J.A. 60. As he entered the house, Narcisse "found five people lying inside, all of them in a pool of blood." J.A. 60. He immediately summoned medical assistance and searched the house for survivors. J.A. 60. In his search he encountered Shelita Russell on the floor of the front room of the house. J.A. 61. She was in "bad condition," "ha[ving] been shot in the hand, the leg, and the abdominal area." J.A. 61-62. Although Russell was sufficiently "conscious and able to talk" to provide her "name, date of birth, and personal information" to Narcisse, "she was not able to give [him] any information or any details of what had happened." J.A. 61-62. In the second room of the house, Narcisse discovered Phillip Young, who, although "he had been shot . . . was conscious, but not able to talk to [him]." J.A. 63. In his continued sweep of the house, Narcisse discovered Larry Boatner in the bathroom, "quite hysterical" and attempting to care for a "severe laceration to the back of his head." J.A. 63.

On cross examination, Narcisse was pressed for the details of any statement Russell, Espadron, or Boatner may have given him. J.A. 72-76. As to Russell, Narcisse reiterated his prior testimony. J.A. 72-73. Narcisse recalled Espadron stating that she "was only able to see . . . one of the perpetrators" and stated his belief that she had mentioned that the perpetrator was "wearing a covering on his face." J.A. 73-74. Asked to elaborate, he testified that he "remember[ed] her saying something about a bandana," but he could not "remember if it was covering his face or around his neck." J.A. 74. Finally, Narcisse testified that Boatner "had a description of the perpetrators," but Narcisse could not recall the details of that description. J.A. 75-76.

2. Rebe Espadron

The events related to the jury by Narcisse took place in the home of Rebe Espadron. Espadron testified that in the early evening of March 1, 1995, a group of friends gathered at her home to celebrate belatedly the birthday of Robert Simons. J.A. 95-97. The celebration consisted of "playing cards, drinking, [and] sitting down chit-chatting." J.A. 98. At a certain point, Espadron retired to her bedroom in the back of the house to watch television with her friend Reginald Harbor. J.A. 97. The others remained in the kitchen at the front of the house. J.A. 98.

Sometime later, Espadron heard "something hit the floor" in the front of the house. J.A. 98. Concerned,

Espadron left her bedroom and proceeded to the living room. J.A. 98. Finding the door between the living room and kitchen to be closed, Espadron began to open it. J.A. 98-99. Before she could fully open the door, a man instructed her to get down on the floor. J.A. 99. In that instant, Espadron noted that the man was wearing a hat and a cloth across his face and was brandishing a "big gun." J.A. 99. Her eyes trained upon this man and the gun, she saw no one else. J.A. 106. Disobeying the command, Espadron closed the door and ran for the safety of her bedroom. J.A. 99. As she ran, gunshots rang out. J.A. 100-01. Espadron remained in her room until a neighbor and a wounded Larry Boatner sought her out and shepherded her out of the house. J.A. 60, 100-02. By then the police had begun to arrive, and Espadron flagged them down. J.A. 103.

3. Larry Boatner

On direct examination, Larry Boatner testified that he was sitting in the kitchen with Willie Leggett, Ian Jackson, James Jackson, and Shelita Russell when he heard a sound outside the house, which he described as "sound[ing] like [a] car [that] needed a muffler on it or either the muffler had a hole in it or something like that. It was real, real loud." J.A. 173-74. Boatner rose and went to the front door of the house. J.A. 174.

As he opened the door, several men "rushed in with guns demanding . . . money and marijuana." J.A. 174. First among them was petitioner, unmasked,

brandishing a "silver" nine-millimeter gun. J.A. 175, 178. Two others entered, one carrying an assault rifle, the other a weapon Boatner described as "a Mac10, it was a Uzi." J.A. 180. Face to face with Boatner, pushing him back and pointing a gun at Boatner's head, petitioner demanded that everyone lie on the floor. J.A. 175. "As everybody was getting on the floor," Boatner testified, "Shelita . . . was still on the phone." J.A. 176. The intruder holding the assault rifle approached her, "snatched the phone out of her hand[,] and told her to get down." J.A. 176. Meanwhile, petitioner held Boatner at gunpoint. J.A. 177. As Boatner expressed it, they were "face to face." J.A. 175.

Eventually, Boatner, too, was ordered to the ground. J.A. 177. While on the floor, Boatner observed the intruder with the assault rifle proceed to the door leading to the living room, open it, and look into the next room. J.A. 177. Thereafter, the intruder approached Boatner, ordering him to stand up. J.A. 177. Boatner complied, but, confused, exclaimed, "Well, what the fuck y'all want me to do?" Petitioner retorted, "You want to be a smart 'lil bitch[?]" Punctuating that thought, he struck Boatner in the head with his gun, causing the severe laceration described by Narcisse. J.A. 178. Boatner took two or three steps and fell to the floor, pretending to have been knocked unconscious. J.A. 178-79. Sometime thereafter, still pretending to be unconscious on the floor, Boatner heard Rebe Espadron open the door between the kitchen and the living room and say, "Man, what y'all doing?" J.A. 179. She was instructed to get on the

floor. J.A. 179. Disobeying, she "slammed the door and ran . . . [and] [w]hen she slammed the door, they just started shooting." J.A. 180. The shooting lasted for "[m]inutes, a long time." J.A. 180. "It seemed like it was never going to stop." J.A. 180. Lying terrified on the floor, "balled up like in a knot," Larry Boatner "wait[ed] to get shot." J.A. 180-81. As he lay there he heard only the sound of bullets, "no screaming, no nothing, just shooting." J.A. 181.

And then it was over. "After the shooting stopped, [Boatner] heard one of them say, 'Come on, man let's go.'" J.A. 181. He "heard three car doors slam and then . . . a car pull[ed] off." J.A. 181. He rose, began to turn, and, "when [he] turned around – an ugly sight." J.A. 181. His friends lay at his feet, "all shot up," dead and dying. J.A. 181. He ran in search of Espadron, "hollering her name, to see if she was okay, to the back where she was." J.A. 182. He found her distraught, asking about her friends and her sister. J.A. 182. He shook his head, "Rebe, they gone." J.A. 182. She asked about Robert Simons.[6] J.A. 182. He, too, was dead. J.A. 182.

Moments later, Boatner found Shelita Russell lying on the floor of the kitchen, severely injured. He instructed Espadron to call for help and assured Russell she would be all right. J.A. 182. That was not

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[6] Simons was Boatner's best friend of almost eight years. J.A. 167.

to be; Shelita Russell, at age 17, would die nine days later. J.A. 79.

Not long after the events of March 1, 1995, Boatner "started having dreams, nightmares about what happened. Seeing different people laying on the floor dead and all those kind of things." J.A. 183. These images haunted him. J.A. 183. To find sleep, he began drinking, heavily. J.A. 184.

On June 7, 1995, an article, accompanied by four photographs, appeared in the Times Picayune newspaper.[7] J.A. 188-90. Among the photographs, Boatner was confronted with the image of the man who had held a gun to his face, whom he recognized "[as] soon as [he] looked at the pictures." J.A. 188. A friend informed Boatner that the man was still at large. J.A. 191. In fear for his life, Boatner began wandering. J.A. 190. Two days later, he fled to Mississippi. J.A. 190-91. He remained there for two weeks, until friends called to inform him that petitioner had been apprehended and that he should return home because he would be needed to testify. J.A. 191, 217.

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[7] The photographs were introduced into evidence through a stipulation by the parties that the judge would provide to the jury the context in which the photographs appeared. Addressing the jury at the admission of the photographs, the district court judge stated, "The photographs you see here [are] an array of photographs that appeared in the Times Picayune on June 7, 1995, depicting possible suspects of the March 1st incident that happened on North Roman Street." J.A. 190.

Throughout his wanderings, Boatner's nightmares continued to torment him, and he continued to drink. J.A. 192. One night, after his return to New Orleans, he went to his mother in tears. J.A. 192. She took him to Charity Hospital, where he admitted himself for treatment and remained for about a week. J.A. 192. Ronquillo visited Boatner there on June 28, 1995.

Ronquillo had first encountered Boatner on the evening of March 1, 1995, at the scene of the murders. J.A. 136. By June 28, 1995, Ronquillo had presented Boatner with a series of twelve photographic lineups. In none of those lineups had Boatner recognized any of the intruders. On June 28, 1995, however, Ronquillo showed Boatner a lineup that included a photograph of petitioner. J.A. 194. Boatner testified that he was able to recognize petitioner as soon as he saw his face. J.A. 194. He testified, "I'll never forget [his] face, never." J.A. 194. Asked to identify his assailant for the jury, Boatner pointed to petitioner: "He's right there. Like I say, I'll never forget him." J.A. 195.

Larry Boatner had more to say. When asked whether he had "notice[d] anything else about his [assailant's] character when he came in the house that day," Boatner responded that the man had had a "[m]outh full of gold." J.A. 196. At the State's request, petitioner then stood and revealed his teeth to the jury. J.A. 196, 200. "Same mouth . . . Same face," Boatner observed. J.A. 196. Before the jury, he had "[n]o doubt" that the man sitting at the defendant's

table was the man that "came to the door that day at 2230 North Roman Street." J.A. 196.

On cross-examination, Boatner was questioned about his assailant. Having had the advantage of "see[ing] him face to face . . . [and] looking him dead in his eyes," Boatner testified that he described the man to the police as being "heavy, like built," and as having "golds in his mouth." J.A. 200. He also described the man's haircut. J.A. 200. Asked whether it was "another person in the house that had a nine-millimeter gun," Boatner corrected defense counsel, insisting that it was petitioner who had carried the nine-millimeter gun. J.A. 201. Challenged as to his expertise in the identification of firearms, Boatner cited as the basis of his knowledge "the movies." J.A. 202.

Cross-examination ended with questions regarding Boatner's identification of petitioner in the photographic lineup. Defense counsel asked, "So you picked out a person that you knew who it was because you had seen him in the newspaper, but you didn't tell the policeman?" Boatner rejoined, "I picked out the person I seen come in that house that held a gun to my head and under my chin and the person that was there when all my friends died." J.A. 218-19.

4. Detective John Ronquillo

Lead detective Ronquillo's testimony began with an extended discussion of the fifteen photographic lineups shown to Rebe Espadron and Larry Boatner

between March 13, 1995 and June 28th 1995.[8] J.A. 121-32. Of those lineups, only two are significant: the eighth and the thirteenth lineups. J.A. 131, 134.

Lineup eight was shown to Larry Boatner on March 22, 1995. J.A. 131. Upon viewing that lineup, Boatner pointed to and indicated, in the words of Ronquillo, "that the gentleman that came into the house initially with the gun that he confronted, had this similar haircut and . . . a similar expression on his face." J.A. 131. That expression, Ronquillo testified, Boatner had described as a "smirk." J.A. 131. Nevertheless, and despite the similarities, Boatner "was positive this wasn't the individual." J.A. 131.

Lineup thirteen was shown to Boatner at Charity Hospital on the afternoon of June 28th, 1995. J.A. 132. Boatner was brought by an aide to an office in the hospital. J.A. 133. Ronquillo "asked him how he was feeling." J.A. 138. Satisfied that he was "coherent," Ronquillo seated him at a desk. J.A. 133, 138. Before Boatner were laid six photographs. J.A. 133. Saying he would "never forget that face," "[Boatner] immediately went to [petitioner's photograph]." J.A. 133. He was not coerced. J.A. 133. He was promised nothing. J.A. 133. Petitioner's photograph was not suggested to him. J.A. 133. Instead, Boatner was simply "positive of [his] identification." J.A. 133.

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[8] Of these, only lineup thirteen included a picture of petitioner. J.A. 121-34.

Ronquillo then testified about his interview with Phillip Young, petitioner's co-defendant. J.A. 135. During his investigation of the North Roman Street murders, Ronquillo had the occasion to visit Young at an extended care facility. J.A. 135. "[S]trapped to a chair" and "fed through a tube," he was, as Ronquillo put it, "in really bad shape." J.A. 135. Such was Young's condition that he "really couldn't talk." J.A. 135. Although "[Young] mumbled" during the interview, Ronquillo "couldn't understand anything that he was saying." J.A. 136.

Ronquillo then testified about Boatner's demeanor when he first encountered him on the evening of March 1, 1995. J.A. 136. He testified that Boatner was "[o]bviously . . . shook up from the incident" but did not appear to be drunk or drugged. J.A. 137.

On cross-examination, petitioner's trial counsel questioned Ronquillo as to the article that had appeared in the Times Picayune newspaper on June 7, 1995 – specifically, whether the article had tainted Boatner's subsequent official identification. J.A. 141. Asked whether Boatner had told him the name of the person he saw in the newspaper, Ronquillo responded, "No, I don't believe he knew it." J.A. 142. "He told me that he saw the picture in the newspaper and he said that . . . one of the men in the picture was the man that came in through the door." J.A. 142.

Cross-examination then turned to the subject of Boatner's description of his assailant and the events surrounding the murders on North Roman Street.

Ronquillo testified that, on the scene, Boatner described the man as "brown-skinned" with a "short-type haircut . . . [and] a lot of golds in his teeth." J.A. 145. He also described the man as carrying a "chrome handgun." J.A. 145.

Ronquillo then related the sequence of events leading to the murders as described to him by Boatner on the scene:

> [Boatner] confronted the man face-to-face. He saw the man. He saw the man come through the door, okay. Then, the man presented a gun and they were ordered to go on the floor. He said, at that point, he got down and then, at one point he got back up and the same man ordered him to get back on the floor. So he repeatedly saw him through the incident, and then he was struck in the back of the head.

J.A. 146. Asked to clarify the meaning of "repeatedly," Ronquillo testified that "[Boatner] saw him as he backed up. He was on the floor, he got up. He looked at him quite a while, apparently." J.A. 146. Asked whether Boatner provided details about any other intruders, Ronquillo testified:

> [Boatner] thought there was three people that came in, but he only concentrated on the first person through the door, because he had the gun . . . He told me that he could only identify the first person through that door. That's what he told me. He said he didn't pay that much attention to [the] other two, but

> he was positive he could identify the first man through the door . . . As he told me at later interviews, when he identified him, he said he would never forget that man's face.

J.A. 147-48.

5. Officer Kenneth Leary

Officer Kenneth Leary, a firearms examiner, testified as an expert regarding ballistic evidence recovered from the scene. On direct examination he testified that he tested the following evidence recovered from the scene: (1) twenty-six 9-millimeter cartridge cases; (2) nineteen 7.62-by-39-millimeter cartridge cases; (3) three 25-millimeter cartridge cases; and (4) one 25-caliber semi-automatic pistol. J.A. 153. His analysis of the 25-millimeter cartridge cases revealed that they were fired by the 25-caliber automatic pistol recovered from the scene.[9] J.A. 154. As to the remaining cartridge cases, Leary testified that all twenty-six 9-millimeter cartridge cases were "fired by one particular weapon, one 9-millimeter handgun"; eighteen of the nineteen 7.62-by-39-millimeter cartridge cases were "positively fired by one 7.62 by 39 millimeter [AK 47 semi-automatic] assault rifle." J.A. 154-55. The nineteenth 7.62-by-39-millimeter cartridge case was inconclusive. J.A. 156.

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[9] Because no weapons compatible with the remaining cartridge cases were recovered from the scene, a similar comparison was not possible as to those cartridge cases. J.A. 154.

6. Patrick Kent

Patrick Kent testified as an expert as to Boatner's medical condition as of June 28, 1995, on the basis of Boatner's medical records from Charity Hospital. Prior to Kent's testimony, the judge held an *in camera* discussion to determine the propriety of permitting Kent to testify as an expert. J.A. 236-41. The State objected to the defense calling Kent because it had not been given notice that the defense would be offering expert testimony. J.A. 237. In response to that objection, defense counsel stated that, although he had subpoenaed Boatner's Charity Hospital medical records two weeks prior to trial, he had only just received them.[10] J.A. 237-38. Citing the "broad discretion" conferred on district court judges to determine whether an expert should be permitted to testify and his desire "to be cautious about what we're doing here," the district judge overruled the State's objection and allowed Kent to take the stand. T. Tr. 271.

Kent admitted that, prior to testifying, he had neither examined Boatner nor consulted with any of

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[10] This delay appears to have been caused by a defect in the subpoena presented by defense counsel to the district court for its signature. When defense counsel brought to the district court's attention during trial that he had not yet received the medical records which were the subject of his subpoena, the district court immediately issued an *instanter* subpoena and called Charity Hospital to emphasize the gravity of the court's order. Upon the arrival of the records at the district court, the judge reviewed them *in camera* and determined that petitioner was entitled to them for use in his defense. J.A. 239-41.

Boatner's doctors. T. Tr. 287. Instead, he testified solely from Boatner's medical records. J.A. 244. From those records, Kent testified that, although Boatner experienced nightmares and "feelings of fear and confusion," there was "no evidence of thought disorder or distortion, no delusions, [and] no paranoia." T. Tr. 289.

C. Verdict and Sentencing

The jury returned a verdict of guilty as charged as to all counts. C.D.C.R. 9. The same jury recommended a sentence of life imprisonment. The state district court, in accordance with law, sentenced petitioner to imprisonment for life as to each count.[11] J.A. 2.

III. Collateral Review Of Petitioner's Conviction

On February 6, 2004, after petitioner's conviction became final, petitioner filed a *pro se* application for

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[11] Petitioner suggests that the prosecution "heavily relied" on these convictions as aggravating circumstances under LA. CODE CRIM. PROC. art. 905.3 and 905.4 justifying the imposition of a sentence of death for petitioner's three convictions in the Morrison Road murders. Pet. Br. 11. Although it is true that the State relied on these convictions as one of the aggravating circumstances justifying petitioner's death sentence, the jury found these convictions as aggravating circumstances in only two of petitioner's death sentences. J.A. 3.

post-conviction relief in the state district court.[12] C.D.C.R. 416-46. Through appointed counsel, petitioner filed a supplemental application for post conviction relief, claiming that he had been denied due process under *Brady v. Maryland*, 373 U.S. 83 (1953), and *Strickland v. Washington*, 466 U.S. 668 (1984). C.D.C.R. 2217-2310.

Petitioner argued that the State withheld evidence material to his guilt – specifically, evidence allegedly tending to undermine the eyewitness identification of petitioner by Larry Boatner: (1) Boatner's medical records; (2) a conversation between Detective Ronquillo and Officer Leary; (3) a formal statement given by Eric Rogers; (4) an interview of Dale Mims; (5) Ronquillo's notes concerning a description supposedly provided by Shelita Russell; (6) Ronquillo's notes concerning an attempt to interview Phillip Young; and (7) certain pre-trial statements of Larry Boatner.

The district court granted an evidentiary hearing on petitioner's post-conviction claims, which occurred over four days. C.D.C.R. 20-21. During that hearing, petitioner offered evidence in the form of documents and testimony.

During the post-conviction hearing, defense counsel attempted to introduce a page of handwritten notes from Larry Boatner's medical records. The notes were

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[12] The Honorable Frank A. Marullo, District Court Judge, Orleans Parish Criminal District Court, Section "D," presided over both petitioner's trial and post-conviction hearing.

attached to the supplemental post-conviction application and are dated June 28, 1995. J.A. 247. Although the trial court declined to allow introduction of the notes for lack of proper authentication, petitioner's trial counsel, Frank Larré testified that at the time of trial, he "didn't know about" these notes. J.A. 346, 399.[13]

The statement made by Officer Leary to Detective Ronquillo is contained in an exhibit attached to petitioner's post-conviction application. J.A. 264-66. No testimony was adduced at the evidentiary hearing in connection with that statement.

Eric Rogers testified as to the May 19, 1995 formal statement he gave to Detective Byron Adams. J.A. 278-96. As summarized in Ronquillo's supplemental report, "Rogers stated to [Detective] Adams that [Robert] Trackling told [Rogers] that [Trackling], along with 'Buckle,' 'Short Dog,' and 'Fats' went to the house on North Roman Street."[14] J.A. 267.

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[13] The page referred to during post-conviction proceedings as DA 002079, is the same page from which defense witness Patrick Kent testified at trial. *See* T. Tr. 289-90.

[14] Robert Trackling also spoke to Adams. On June 1, 1995, Trackling gave a formal statement to Adams in which he confessed his involvement in the Morrison Road murders. J.A. 266-68. Continuing his statement, Trackling denied involvement in the North Roman Street murders, but implicated Kintad Phillips, Donielle Bannister, and petitioner, who had told Trackling of their involvement. J.A. 268.

Rogers testified that he shared a cell with Robert Trackling while incarcerated in the Orleans Parish Prison and that during that time Trackling relayed information to him concerning the North Roman Street murders. J.A. 427, 429-30. Rogers explained that, after he received this information, he contacted his investigator. J.A. 427-28. The investigator, in turn, contacted Byron Adams, who ultimately took a recorded statement from Rogers.[15] J.A. 428. At the evidentiary hearing Rogers testified that "[Detective Adams] said that if I do him a favor he would go talk to some people and get my life sentence took back. So, he had asked me to involve Short Dog, Juan Smith." J.A. 430, 431, 432-36, 442-43. Although Rogers' life sentence never was "took back," Rogers did not allege the existence of this agreement until nearly ten years after the fact, when Adams had passed away. J.A. 438, 443; C.D.C.R. 1384-86.

Dale Mims testified that he lived two doors from the home of the crime scene. J.A. 406-07. He was home on the night of the offense, and heard "a whole lot of gunshots." J.A. 401. Once the shooting stopped, Mims stepped outside. J.A. 402. He saw two masked men on opposite sides of a four-door white car. J.A.

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[15] According to the transcript of Rogers' statement, it appears the proper spelling of this investigator's name is "Reyne" or "Raene." J.A. 278. During the post-conviction testimony of both Rogers and Larré, however, the court reporter consistently transcribed the phonetic spelling of the name: "Rain." J.A. 317, 431-32, 437.

402-03. When asked, "[d]id you see the two people at the car coming out of the house?," he replied, "No. All I saw was when they were going for the car."[16] J.A. 402. Notes concerning a statement by Mims were introduced during the post-conviction hearing. J.A. 309, 321-23, 513.

During the post-conviction hearing, petitioner introduced handwritten notes, assuming that they were Ronquillo's notes from an interview with Shelita Russell.[17] J.A. 545. Ronquillo testified that the handwriting was his, but were not notes of an interview with Shelita Russell because he had never spoken to Russell. J.A. 544-47. In trying to determine the significance of his notes, Ronquillo pointed out that the pages previously presented to him were from "almost two weeks after the incident," and stated, "There is a page missing here. There has to be." J.A. 546, 547. Although petitioner's counsel indicated that she had a "complete set," she told Ronquillo that she had "only pulled out what [she] would need" and moved on to another line of questioning. J.A. 548.

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[16] Ronquillo testified that Mims had seen four men exit the house. J.A. 567.

[17] The note reads:

> – FACE DOWN PERP – VICTIM #3 LYING ON HANDS AND WRIST OF PERP – FEMALE – FACE DOWN AGAINST CABINETS – CONSCIOUS – SAID – IN KITCHEN SAW PEOPLE BARGE IN – ONE – BLACK CLOTH ACROSS FACE – FIRST ONE THROUGH DOOR – NFS –

J.A. 310.

Ronquillo identified a handwritten note which was created in connection with an attempted interview of Phillip Young.[18] J.A. 549-50. At that time, Young was at an extended-care facility, and was "strapped in[to] a wheelchair because he couldn't sit up on his own," unable to speak.[19] J.A. 550-51. The form of communication suggested by Young's nurse was one blink for "yes" and two blinks for "no." J.A. 272. Ronquillo explained, "I would ask him some questions, and I wasn't really sure if he was [answering in the] affirmative or negative, and I'd ask him to do it again, and he wouldn't do it." J.A. 551. Ronquillo

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[18] That note reads:

2:10 PM: MIRANDA – B. RILEY PRESENT –
ACKNOWLEDGED UNDERSTOOD RIGHTS –
SHORT DOG/BUCKO/FATS – NO – DIDN'T SHOOT ME
NO – NOT WITH ME
WHEN WENT TO HOUSE
YES – ONE OF PEOPLE IN HOUSE SHOT ME
NO – NOT RESPONSIBLE – 'POSSE'
DIDN'T DRIVE TO HOUSE – 'POSSE'
YES – KNOWS NAMES OF PERPS
YES – DROVE IN CAR –
YES – GIRLFRIENDS CAR –

[19] The post-conviction testimony of Barbara Riley, Head Nurse of the Brain Injury and Stroke Unit of the extended care facility, confirms Ronquillo's testimony. J.A. 418. According to Riley, Young was "aphasic" and "did not speak." J.A. 419, 423-24. A more recent evaluation of Young's condition reveals that, as a result of his "traumatic brain injury," Young also suffers from both retrograde amnesia (an "inability to recall things that occurr[ed] before [the] brain injury") and antegrade amnesia (an "inability to recall things that occur after the brain injury"). C.D.C.R. 243-46.

further explained, "[w]hen I was writing these things down, I wasn't quite sure exactly – Well, that's why I kind of disavowed the whole thing because I wasn't really sure of his answers." J.A. 553. Ronquillo testified that ultimately, "I never had hide nor hair actually of what he said or what he was talking about." J.A. 550.

In support of the claim that the State failed to disclose three statements of Larry Boatner, petitioner called Ronquillo during the post-conviction hearing. When questioned about the first statement – a handwritten note memorializing Boatner's statement at the scene that he "could not supply a description of the perpetrators other than they were black males" – Ronquillo explained:

> At the scene he said that – He just supplied the description of the perpetrators other than that [they] were black males. Keep in mind at that point that he was in the home and there dead bodies everywhere. At that point, I think he was a little shook up. He was then transported to the Homicide Division office where he gave a formal statement. When he gave the formal statement, he gave a description which is very close to Mr. Smith, especially with the haircut and the golds and the skin color. And, that particular night, he emphasized that he could only describe and identify the first person that came through the door.

J.A. 529-31.

The second statement, in its entirety, is as follows:

> I can tell you about one, the one who put the pistol in my face, he was a black male with a low cut, gold[s] in his mouth, I don't know how many, that's all, I was too scared to look at anybody, all of the[m] had guns, one who an AK, one had a TEC-9, the one who hit me had a chrome automatic, it was big. I hear the car because it was so loud, the muffler, I know it need a muffler. I opened the door, I see these two guys, one he throws the gun in my face, the other one walked in behind him, he had the AK. I saw him get out of a car, the third guy, I didn't see the guy he had a TEC-9, it was an Uzi. He was pointing it at everyone on the floor. I was too scared to look at them, they was about my complexion, brown skinned.

J.A. 296.

The third statement consists of handwritten notes memorializing a conversation that took place on March 6, 1995. J.A. 308. With respect to that statement, Ronquillo testified:

> [O]n the Sixth, I called him to talk to Mr. Boatner. At that time, he told me he couldn't identify anyone. And to me, that was his not wanting to be involved in this case anymore. Because on the night of the incident he said that he could and he gave a description that

was very close to Mr. Smith's description that particular night.

J.A. 528.

SUMMARY OF THE ARGUMENT

Petitioner asks this Court to vacate five first-degree murder convictions, claiming that the State suppressed information material to his guilt in violation of this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). The information upon which petitioner relies, however, is largely inadmissible, unsuppressed, and unfavorable. Moreover, petitioner cannot demonstrate that the information – individually or cumulatively – undermines confidence in the outcome of his trial, and his claim is therefore meritless.

Petitioner has deeply buried a significant legal issue by misreading the jurisprudence of this Court. The handwritten notes of Ronquillo, allegedly memorializing a dying declaration by Shelita Russell and a statement against interest by Phillip Young, would not have been admissible evidence at petitioner's trial because the statements are hearsay and petitioner has failed to establish the indicia of reliability necessary to bring them within an exception. Moreover, petitioner has failed to point to any admissible evidence to which the alleged statements would have led.

Petitioner has misrepresented and mischaracterized the information upon which he relies. The State did not suppress Larry Boatner's medical records because petitioner possessed the medical records during trial – a fact made obvious by his use of them while examining a defense witness. The State did not suppress a statement made by Dale Mims because defense counsel's choice not to dispatch petitioner's court-appointed investigator to interview nearby neighbors such as Mims is a failure of ordinary diligence, not suppression by the State. The State did not suppress Eric Rogers' formal statement because when Rogers made his formal statement a member of petitioner's defense team was present. Moreover, Rogers' statement is not favorable to petitioner because it inculpates petitioner and would not have led petitioner to admissible evidence. The statement of Kenneth Leary is not favorable to petitioner because it confirms rather than contradicts both Leary's own trial testimony and that of Boatner.

In the end, petitioner is left to argue the materiality of two pre-trial statements by Larry Boatner. Those statements, however, are not material because the jury would have heard and considered the circumstances under which the statements were made and would have balanced Boatner's understandable, temporary equivocation against the strength of his identifications – both in court and out of court – of petitioner as the man who attacked him and murdered five of his friends.

ARGUMENT

I. Petitioner Relies Upon Irrelevant Matters

Petitioner claims the State denied him Due Process by withholding evidence material to his guilt, in violation of this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases. He attempts to conjure support for his claim by invoking "a long and disturbing history of *Brady* violations in Orleans Parish." Pet. Br. 32. That invocation, however, is irrelevant to the factual inquiry presented to this Court. Indeed, even petitioner is constrained to concede that such history "does not compel reversal of petitioner's convictions any more than the prior bad acts of a defendant justify a guilty verdict." Pet. Br. 33. That concession notwithstanding, the accusation which precedes it merits attention.

That there has been even one *Brady* violation in Orleans Parish is to be lamented. In its opinion in *Brady*, this Court articulated the ideal towards which all prosecutorial offices must strive: "[The Government's] chief business is not to achieve victory but to establish justice . . . [and] the Government wins its point when justice is done in its courts." 373 U.S. at 87 n.2. That ideal has resonated in the courts of Louisiana. *See State v. Cordier*, 297 So.2d 181 (La. 1974); *State v. Bailey*, 261 So.2d 583 (La. 1972); *State v. Gladden*, 257 So.2d 388, (La. 1972). Yet it is inarguable that, in striving to comply with the teachings of this Court, the State has not always succeeded in attaining its goal. Seizing upon that recognition,

petitioner makes a base appeal to prejudice, attempting to manipulate the just concerns of this Court.

Truth, however, will not support that attempt. Petitioner has conducted a review of *Brady* violations in Orleans Parish, purporting to find a total of twenty-eight such violations in the forty-eight years since *Brady* was decided. Pet. for Cert. 9-10; *cf.* Pet. Br. 32. However, review of the cases cited by petitioner reveals that only thirteen of those twenty-eight cases actually found *Brady* violations.[20]

There is more. In a bald attempt to incite prejudice, petitioner attacks *ad hominem* the prosecutor who sought his conviction. Pet. Br. 33. As this Court has noted, however, "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *United States v. Agurs*, 427 U.S. 97, 111 (1976).[21] The character of the evidence relied upon by petitioner will not support his claim.

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[20] If petitioner's *amicus*, Orleans Public Defenders Office, is to be credited, all thirteen of those cases would represent only one-tenth of one percent of the cases brought before the Orleans Parish Criminal District Court each year. Brief for the Orleans Public Defenders Office as *Amicus Curiae* Supporting Petitioner 2. See also, *Connick v. Thompson*, 131 S.Ct. 1350, 1367 (2011) (Scalia, J., concurring) (discussing "the Law of Large Numbers").

[21] The American Bar Association (ABA) asks this Court to "again recognize" a prosecutor's disclosure obligations under ABA Model Rule 3.8(d). Brief for the American Bar Association as *Amicus Curiae* Supporting Petitioner ("ABA Br.") 5. That issue is not properly before this Court. Petitioner's argument is

(Continued on following page)

II. Petitioner Relies Upon Inadmissible Information.

In his argument to this Court, petitioner relies heavily upon the handwritten notes of Ronquillo –

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limited to a claim of constitutional error. The ABA's standards for prosecutors and its model attorney ethics rules do not bear on that issue. Although this Court has previously suggested that a prosecutor's disclosure duties "may arise more broadly" under attorney ethics rules or the ABA standards than under substantive *Brady* law, see, e.g., *Cone v. Bell*, 129 S.Ct. 1769, 1783 n.15 (2009), this Court should refrain from doing so here. An alleged *Brady* violation is properly judged "under the *constitutional* standards [this Court] ha[s] set forth, not under whatever standards the American Bar Association may have established. The ABA standards are wholly irrelevant to the disposition of" *Brady* claims. *Id.* at 1787 (Roberts, C.J., concurring in the judgment) (emphasis in original). And this Court's statements, even in dictum, may have unintended wide repercussions. The ABA's suggestion that Model Rule 3.8(d) "mandates disclosure of exculpatory material without regard to materiality" is highly controversial and different jurisdictions treat this issue differently under their own rules and law. ABA Br. 5; compare, e.g., *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 130 (Ohio 2010) ("We decline to construe [Ohio] DR 7-103(B) [predecessor to Rule 3.8(d)] as requiring a greater scope of disclosure than *Brady* and Crim. R. 16 require.") and *In re Jordan*, 913 So.2d 775, 781 (La. 2005) (finding Louisiana Rule 3.8(d) "recognizably similar" to the duties required under *Brady*; when prosecutor failed to disclose exculpatory *Brady* information, he violated Rule 3.8(d) as well); with *United States v. Acosta*, 357 F. Supp. 2d 1228, 1246-47 (D. Nev. 2005) ("Thus, prosecutors in this district and elsewhere are obligated to timely disclose to the defense evidence or information known to the prosecutor that tends to negate guilt of the accused or mitigate the offense, whether or not these disclosures meet *Brady*'s materiality standard."). This Court should not step into that controversy in a case that does not require it to do so.

particularly those notes concerning Shelita Russell and Phillip Young. Those notes, however, would not have been admissible evidence at petitioner's trial for any purpose.

In *Wood v. Bartholomew*, 516 U.S. 1 (1995), this Court held that where information is "inadmissible under state law, even for impeachment purposes," that information "is not 'evidence' at all" and that for that reason, disclosure of such information could not affect the outcome of the trial. *Id.* at 5-6. Notwithstanding the clarity of that statement, petitioner counsels this Court to "consider the possibility that, even if a piece of suppressed [information] would not itself have been admissible at trial, it would have led to admissible evidence if it had been produced." Pet. Br. 31. Petitioner, however, can point to no such evidence and instead forces this Court to speculate as to its existence. This Court has consistently declined to do so:

> To get around [the defendant's evidentiary] problem, the Ninth Circuit reasoned that the information, had it been disclosed to the defense, might have led [the defense] to conduct additional discovery that might have led to some additional evidence that could have been utilized. . . . [However,] because the Court of Appeals did not specify what particular evidence it had in mind[,] [i]ts judgment is based on mere speculation, in violation of the standards [this Court] [has] established.

Wood, 516 U.S. at 5-6. Because the petitioner can demonstrate neither the admissibility of the alleged

statements of Russell and Young nor that those statements would have led him to admissible evidence, those statements cannot be *Brady* material.

A. Ronquillo's Handwritten Notes Concerning Shelita Russell Would Not Have Been Admissible at Petitioner's Trial

Based on Ronquillo's notes, petitioner asserts that Shelita Russell made a dying declaration – that is, a "statement made by a declarant while he believed that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." LA. CODE EVID. art. 804(B)(2). Interpreting that article, the Louisiana Supreme Court has stated that a declaration "that fails to meet either the timing or the content requirement of a dying declaration is inadmissible." *Garza v. Delta Tau Delta Fraternity Nat'l*, 948 So.2d 84, 92-93 (La. 2006). Petitioner has met neither of those requirements.

First, petitioner has failed to satisfy the content requirement because petitioner has offered no witness competent to testify as to what Russell said, if anything. Ronquillo himself testified that he had never spoken to Russell because, by the time he arrived at the scene, she had been transported to the hospital. J.A. 547. As such, his notes merely memorialize something conveyed to him by "someone else." J.A. 546-47. Louisiana Code of Evidence article 602 provides, in relevant part, that "[a] witness may not

testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Additionally, Louisiana Code of Evidence article 901(A) provides in relevant part that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Petitioner has failed to identify any witness with personal knowledge who could testify that Ronquillo's notes are what petitioner claims.

Because petitioner has failed to identify any witness competent to testify as to the content of Ronquillo's notes, petitioner would have been forced to attempt to introduce the handwritten notes themselves. That attempt would have failed. At best, the notes are triple hearsay. Russell is the primary declarant. "Someone else" is the secondary declarant. Ronquillo is the tertiary declarant. Hearsay within hearsay is permissible in Louisiana, but only "if each part of the combined statements conforms with an exception to the hearsay rule provided by legislation." LA. CODE EVID. art. 805. Petitioner has not identified the person to whom Russell allegedly made her statement; thus, a crucial link is missing from the evidentiary chain.

Second, petitioner has not satisfied the timing requirement because petitioner has offered no evidence that, at the time of her alleged statement, Russell believed her death to be imminent. Attempting to offer such evidence, petitioner directs this Court to the

trial testimony of Rebe Espadron, wherein Espadron testified that, prior to the arrival of the police, Russell stated "I'm 'gonna die." Pet. Br. 36-37 (citing J.A. 102). That evidence, however, establishes neither the circumstances under which Russell made her alleged statement, nor does it establish whether she still believed her death to be imminent *at the time she allegedly made the statement*.

Finally, petitioner fails to point to any piece of admissible evidence to which the notes would have led, making petitioner's claim "mere speculation" at best. *See Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995). Because the notes petitioner alleges to be the dying declaration of Shelita Russell would not have been admissible for any purpose, Detective Ronquillo's notes cannot be *Brady* material.

B. Ronquillo's Handwritten Notes Concerning Phillip Young Would Not Have Been Admissible at Petitioner's Trial.

Petitioner asserts that, "[i]f Young had been unable or unwilling to testify, the defense could have introduced Young's statement as a statement against interest by an unavailable witness." Pet. Br. 44. First, there is no merit to petitioner's assumption that Detective Ronquillo's notes memorialize a "statement" of any kind by Phillip Young. Second, there is no merit to petitioner's assertion that Ronquillo's notes purportedly memorializing a statement of Phillip Young would have been admissible as a statement against interest.

For petitioner to have succeeded in offering Ronquillo's notes as evidence of Young's purported statement, petitioner would have had to have offered "evidence sufficient to support a finding that the matter in question is what its proponent claims." *See* LA. CODE EVID. art. 901(A). At trial, however, Ronquillo testified that he "couldn't understand anything that [Young] was saying." J.A. 136. Expanding on that answer at post-conviction, Ronquillo explained:

> He couldn't talk. And, that's the whole question of this whole deal is that when I went there to talk to him, after I left I never had hide nor hair actually of what he said or what he was talking about. . . .
>
> He couldn't talk. And, yes and no, and he would try to do things like that. And, a lot of it, he wouldn't even answer. He would just kind of sit there and he would look. And, he didn't say anything.
>
> * * *
>
> And, he kind of like acted like he was nodding off like he was sleeping. It was not anything that I thought had any substance or – The only things that he appeared to be positive of was before he knew that I was from the Homicide Division, and when I asked him questions about his general health. He seemed to be affirmative in his responses, the[n], but after he found out – I could distinguish between yes and no, and then after that – I wrote notes here, and I am really not sure what his – what he was actually saying.

J.A. 550-551. Barbara Riley's post-conviction testimony confirms the truth of Ronquillo's testimony. Riley testified that Young was "aphasic" and "did not speak." J.A. 418-424. Moreover, a more recent evaluation reveals that as a result of Young's "traumatic brain injury" he has both retrograde and antegrade amnesia. C.D.C.R. 243-246. Thus, petitioner's attempt to render competent the ambiguous gestural responses of a severely brain-damaged, aphasic amnesiac is unpersuasive. J.A. 272-273, 550-553.

Second, there is no merit to the argument that Young's statements would be admissible as a "statement against interest." In Louisiana, a statement against interest is:

> A statement which at the time of its making . . . so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

LA. CODE EVID. art. 804(A) & (B)(3).

Even assuming that the notes actually reflect some sort of meaningful interaction between Ronquillo and Young, the notes only establish that Young was present at the time of the shooting, that he drove to the house in his girlfriend's car, that he knew the names of the perpetrators, and that Short Dog,

Bucko, and Fats were not with him when he drove to the house. J.A. 311. Further assuming *arguendo* that this "tend[s] to subject him to civil or criminal liability" and has some exculpatory value, the record is devoid of any "corroborating circumstances clearly indicat[ing] the trustworthiness of [that] statement." *See* LA. CODE EVID. art. 804(B)(3). Petitioner points to Young's alleged remarks "that he had driven to the house in his girlfriend's car and that he had been shot by one of the people in the house. . . ." Pet. Br. 45 n. 15. Such remarks, however, are not the type of corroborating circumstances the law contemplates. As the Louisiana Supreme Court has noted: "Typical corroborating circumstances include statements against the declarant's interest to an unusual or devastating degree, or the declarant's repeating of consistent statements, or the fact that the declarant was not likely motivated to falsify for the benefit of the accused." *State v. Hammons*, 597 So.2d 990, 997 (La. 1992). First, Young's alleged statement is not against his interest to an unusual or devastating degree because it contains no admission of criminal acts and no information the police did not already possess. Second, because Young has only made one "statement" he cannot have repeated consistent statements. Third, because petitioner was an associate of Young, Young had motivation to falsify for the benefit of petitioner. Therefore, because Young's statement lacks any corroborating circumstances, it would not have been admissible at trial as a statement against interest.

III. Petitioner Relies Upon Information That Was Not Suppressed And Is Not Favorable

As this Court has explained, a defendant asserting a *Brady* claim must satisfy three requirements: first, the "evidence must have been suppressed by the State"; second "[t]he evidence at issue must be favorable to the accused"; and third, "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Petitioner observes that "[i]n its brief in opposition to the petition for certiorari, respondent did not dispute that petitioner has satisfied the first two requirements of *Brady*. . . ." Pet. Br. 30. Respondent does so now.

A. The Medical Records of Larry Boatner Were Not Suppressed

Petitioner has consistently represented that the State suppressed the medical records of Larry Boatner.[22] The record reflects, however, that petitioner himself subpoenaed these medical records, retained an expert to evaluate those records, *and actually made use of those records at trial*. J.A. 240; T. Tr. 289-90. Petitioner's trial counsel, Frank Larré, instructed the defense's expert witness, Patrick Kent, to read from them during his testimony:

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[22] Petitioner has repeated this representation in every post-conviction filing, save one: his Brief on the Merits in this Court. See C.D.C.R. 2233; C.D.C.R. 2385; 2009-KP-1164, Application for Supervisory Writ 12; Pet. for Cert. at 16.

[Kent]: I'm not sure I know where you want me to read. Where it says "Feelings of fear?"

[Larré]: Read right here.

[Kent]: Okay. "Patient continue[s"] – this is an entry on 6-28 at 10:00, apparently. "Patient continue[s] to express feelings of fear and confusion."

[Larré]: And, that notation is on 6-28; he had feelings of fear and confusion?

[Kent]: Yeah, that's the recording.

[Larré]: I have no further questions.

T. Tr. 289-90. The notation which Larré directed Kent to read to the jury is on the *same page* and in the *same paragraph* as the statement of Larry Boatner about which petitioner now complains. J.A. 247. The paragraph consists of four sentences; petitioner's counsel had Kent read the *second* sentence to the jury – but petitioner now complains that the *first* sentence was suppressed. That petitioner's trial counsel elected not to make use of that notation at trial is not cognizable as a *Brady* claim.

B. The Statement of Dale Mims Was Not Suppressed and Are Is Favorable

Petitioner asserts that "[i]f the defense had been aware of [Dale Mims'] statement, he could have called

Mims to testify at trial."[23] Pet. Br. 37. While this Court has yet to directly address the intersection of the defense's duty to investigate and the prosecution's duty to disclose, the overwhelming majority of federal appellate courts have held that there is no "suppression" within the meaning of *Brady* when the allegedly suppressed information could have been independently obtained by the exercise of ordinary diligence on the part of the defendant.[24]

Petitioner's trial counsel would have obtained the statement of Dale Mims had he exercised ordinary diligence. Mims lived only two houses down from 2230 North Roman Street in a residential neighborhood that, on the night of the murders, was "like a war zone." J.A. 408. Even the most routine of investigations would have included interviews with neighbors in search of an eyewitness who might have been able to exonerate petitioner. Yet, the record is devoid of any indication that petitioner's trial counsel ever

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[23] That assertion is belied by petitioner's choice not to call Mims to testify at post-conviction.

[24] See generally *State v. Mullen*, slip op. at 18-19 & n. 5, 171 Wash.2d 881, 2011 WL 2474263 (Wash. 2011) (collecting cases from every federal appellate court that hears criminal appeals); see also, e.g., *Boss v. Pierce*, 263 F.3d 734, 743-44 (7th Cir. 2001) (information possessed by a witness is not suppressed where that information is of a type that would have been uncovered by "any investigator worth his or her salt").

dispatched his court-appointed investigator to conduct such interviews.[25]

Moreover, petitioner's assertion that Mims' statement is favorable to petitioner – because it "indicate[s] that the first man who had entered the house was wearing a mask" – is squarely contradicted by Mims' testimony at post-conviction. Pet. Br. 37 (internal quotation marks omitted). He testified that he never saw anyone enter or exit the house. J.A. 402-07. Indeed, it would have been impossible for him to have done so because the door of 2230 North Roman Street was not visible from his vantage point. J.A. 578-81.

C. The Statement of Eric Rogers Was Not Suppressed and Is Not Favorable

On May 19, 1995, Eric Rogers made a formal statement to Byron Adams, who was the lead investigator in the Morrison Road murders. J.A. 277-78. Petitioner alleges that the State suppressed that statement and that "if the defense had been aware of Rogers'[ ] statement relating Trackling's confession, defense counsel (or the private investigator the defense had retained) could have spoken to Rogers. . . ."[26]

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[25] It is also noteworthy that the defendant did not call his investigator as a witness during the post-conviction proceedings.

[26] Petitioner's investigator was court-appointed.

Pet. Br. 27. But the transcript of Rogers' statement establishes that when Rogers made his statement three people were present: Rogers, Adams, and investigator Sam Rain. Rain was *petitioner's investigator in this case.*[27] J.A. 278. Because the statement was made in the presence of a person who was part of petitioner's defense team, it is difficult to comprehend how it can be said to have been suppressed. Nor is the Rogers statement favorable. It is squarely inculpatory. It identifies petitioner as a perpetrator. Inculpatory information does not fall within the scope of *Brady*.

Further, the alleged agreement between Adams and Rogers is not favorable to petitioner because it never occurred. Rogers testified at post-conviction that he first heard the name Juan Smith "when [he] was in the Homicide Office with Byron Adams and Sam Rain" J.A. 437. But by the time Rogers came forward to make his allegation, Adams had died, leaving Rain alone to corroborate Rogers' allegation. Petitioner, however, chose not to call his own investigator as a witness at post-conviction. Instead, petitioner chose

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[27] According to the transcript of Eric Rogers' statement, it appears the proper spelling of this name is Reyne. C.D.C.R. 2933. During the post-conviction testimony of both Rogers and Larré, however, the court reporter consistently transcribed the phonetic spelling of this name: "Rain." J.A. 317, 431-32, 437. Mr. Rain was at that time acting in his capacity as court-appointed investigator for Eric Rogers. There is no reason to believe that Rain would not use this information in his capacity as petitioner's investigator as the information was not privileged – the statements made by Rogers to Adams can in no way be deemed "confidential." See LA. CODE. EVID. art. 506(A)(5).

to rely solely on Rogers' testimony, which is inherently suspicious: as this Court has noted, "there is something suspect about a defense witness [such as Rogers] who is not identified until after the 11th hour has passed." *Taylor v. Illinois*, 484 U.S. 400, 414 (1988). Moreover, even assuming the alleged agreement between Adams and Rogers occurred, that agreement is not favorable to petitioner because it is not material to his guilt or punishment and could not have been used for impeachment. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady*, 373 U.S. 83 (1963). The State never relied on Rogers' formal statement to obtain petitioner's conviction. Rather, petitioner makes the fantastic assertion that the police sought to frame petitioner and that if Rogers' uncorroborated accusation had been placed before the jury, the jury would have seen that the entire investigation was corrupt and founded upon a lie. That assertion ignores the fact that, had petitioner attempted to offer Rogers as a witness at trial, the State would have called Rain and Adams – both veteran police officers who were alive at the time – to testify truthfully and contradict Rogers, a convicted murderer recanting a sworn statement.

D. The Statement of Officer Leary Is Not Favorable

Firearms examiner Kenneth Leary testified that, "[a]fter examining all 26 of . . . the 9-millimeter cartridge cases, [he] was able to reach the conclusion that all 26 cartridge cases w[ere] fired by one

particular weapon, one-9-millimeter handgun." J.A. 155. Petitioner alleges that Ronquillo's handwritten notes memorialize a conversation in which Leary informed him that all of the 9-millimeter casings "had been matched to a machine pistol of the Intratec or MAC-11 type." Pet. Br. 48. From this, petitioner claims that Leary intentionally misled the jury into believing that the crimes were committed with a "9-millimeter handgun" and that the State withheld evidence that might have been used to impeach his testimony. Pet. Br. 48. Essentially, petitioner's argument is that "machine pistols such as [those described by Leary to Ronquillo prior to trial] are not 'handguns' [as Leary testified at trial]." Pet. Br. 48.

That argument proceeds from ignorance. The term "handgun" *includes* machine pistols of the Intratec or MAC-11 type. Louisiana law defines "handgun" to mean

> [A] type of firearm commonly referred to as a pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or is capable of firing fixed cartridge ammunition. The term handgun shall not include shotguns or rifles that have been altered by having their stocks or barrels cut or shortened.[28]

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[28] This definition accords with federal law. *See* 18 U.S.C. § 921 ("a firearm which has a short stock and is designed to be held and fired by the use of a single hand. . . .").

LA. REV. STAT. 40:1379.3. Thus, contrary to petitioner's assertion, an "Inter Tec, 'Mac 11' model type, semi[-]automatic weapon" comfortably fits within the definition of "handgun." J.A. 266. Although both a Mac 10 and a Mac 11 (a smaller version of the Mac 10) afford purchasers the *option* of a stock, they are designed to be fired by the use of a single hand without a stock and are thus a type of "handgun." *See Jane's Pocket Book of Pistols and Sub-Machine Guns* 189-90 (Denis Archer ed. 1976). Moreover, neither weapon is a rifle or a shotgun such as would be "altered by having their stocks or barrels cut or shortened." Accordingly, Leary's statement does not contradict his trial testimony.

Petitioner further asserts that "based . . . on Leary's pretrial statement that the 9-millimeter casing found at the scene came not from a 9-millimeter handgun but instead from a different type of weapon purportedly carried by another perpetrator, the jury readily could have concluded that petitioner was not one of the shooters." Pet. Br. 49. That argument is irrelevant. The prosecution presented no evidence that petitioner was one of the shooters, and was not required to do so.[20] Under Louisiana law, "a person may be convicted of intentional murder even if he has not personally struck the fatal blows." *State v. Wright*, 834 So.2d 974, 982 (La. 2002) (citing LA. REV. STAT. 14:24). Petitioner's guilt would not be lessened even if

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[20] Conspicuously absent from petitioner's assertion that "the prosecution went to great lengths to prove that petitioner was one of the shooters" is a citation to the court record. Pet. Br. 46.

the jury had known for a certainty that petitioner had not been one of the shooters.

IV. Petitioner Has Not Shown Prejudice

Larry Boatner's medical records were not suppressed. The formal statement of Eric Rogers was not suppressed and is not favorable to petitioner. The statement of Dale Mims was not suppressed and is not favorable to petitioner. The statement of Kenneth Leary is not favorable to petitioner. None of the foregoing information, then, factors into the materiality analysis. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

The handwritten notes of Ronquillo concerning statements purportedly made by Shelita Russell and Phillip Young could not have affected the outcome of the trial because they could not have been introduced at trial. *See Wood v. Bartholomew*, 516 U.S. 1 (1995). Nevertheless, to the extent this Court may find otherwise, petitioner is therefore left to argue the materiality only of the handwritten notes pertaining to Shelita Russell and Phillip Young and the statements of Larry Boatner.

A. Ronquillo's Notes Concerning Shelita Russell Do Not Undermine Confidence in the Verdict

Ronquillo's handwritten notes purportedly memorializing a statement by Shelita Russell would not have been admissible at petitioner's trial. Yet, even if the notes were admissible evidence, it does not

"undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Petitioner reads the notes to indicate that Shelita Russell said that the "first person through the door had a black cloth across his face." Pet. Br. 36. That reading is improbable.

At the time the intruders entered, Russell was so distracted by a telephone conversation that to get her attention, it was necessary for one of the intruders, armed with an assault rifle, to cross to Russell's side of the room and forcibly take the telephone from her hand. J.A. 176. Because Russell was distracted, she likely would not have seen the *first* person who came through the doorway; rather, her statement most likely refers only to the first person *she* saw come through the doorway.

Even if Russell's statement is taken for the value petitioner suggests, it may be easily reconciled with Boatner's testimony. The jury would likely have found that Boatner and Russell referred to two different people. While Boatner was standing in the doorway, two people approached nearly simultaneously. J.A. 174-75. Boatner's presence in the doorway likely obstructed Russell's view in such a way as to prevent her from accurately noting who was actually the first person through the doorway. To Boatner it was his unmasked assailant; to Russell it was likely another, masked intruder. The jury would have heard both of these accounts, reconciled them, and still have found petitioner guilty.

B. Ronquillo's Notes Concerning Phillip Young Do Not Undermine Confidence in the Verdict

Petitioner asserts that "[n]ot only was Young's 'statement' powerful exculpatory evidence on its own, but the defense could have used it in cross-examining Officer Ronquillo: . . . to impeach Ronquillo's testimony that Young was not 'able to communicate with [him] at all'. . . ." Pet. Br. 45. This assertion is meritless.

On its own, Young's alleged statement, "Short Dog/Bucko/Fats – No – Not with me when went to house," establishes only that Young did not travel to 2230 North Roman Street with petitioner. It does not preclude the conclusion that they arrived separately and murdered together. Indeed, the formal statement of Eric Rogers (relaying the statement of Robert Trackling) regarding the murders at North Roman Street lends support to this scenario. Trackling (through Rogers) does not mention Young as being with him when he went to the house, although clearly Young participated in the murders. J.A. 278-93. In addition, Rogers' statement suggests there was a second, burgundy car used by the perpetrators to flee the scene. J.A. 283.

As explained earlier, Ronquillo did not testify that "Young was not 'able to communicate with [him] at all'" but rather testified that "[he] couldn't understand anything that [Young] was saying," which is in no way inconsistent with the fact that Ronquillo

memorialized in his notes the questions that he tried to ask Phillip Young. Ronquillo's notes, therefore, would not have served the purposes petitioner claims.

C. Larry Boatner's Pre-Trial Statements Do Not Undermine Confidence in the Verdict

This Court has articulated several factors relevant to the reliability of an eyewitness identification: the opportunity to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972). The factors demonstrate the reliability of Boatner's identification of petitioner.

Opportunity to view. Boatner was "no casual observer." *Biggers*, 409 U.S. at 200. He was a victim. Moreover, he "spent a considerable amount of time with [his] assailant" and "faced him directly and intimately." *Id.* And, although his description "might not have satisfied Proust, [it] was more than ordinarily thorough." *Id.* Boatner was standing in the front doorway of the house when the intruders – petitioner first among them and unmasked – barged into the house. J.A. 175. While others were ordered to the floor, Boatner remained standing, "face to face" with petitioner, who was holding a gun to Boatner's head. J.A.

175. Even when ordered to the floor, Boatner trained his view on petitioner, who hovered over him with the gun. J.A. 176-77. When Boatner was ordered to return to standing, he was once again face to face with petitioner, separated from him only by the length of petitioner's gun. J.A. 178. It was only when petitioner struck Boatner with that weapon that Boatner closed his eyes, fell to the ground, and pretended to be unconscious. J.A. 178-79.

Degree of attention. As Boatner testified at trial, "My concentration was on the guy that had me. I was trying to see who he was." J.A. 177. Moreover, the presence of a gun during the commission of a crime creates in witnesses a heightened degree of attention. *See United States v. Crozier*, 259 F.3d 503, 511 (6th Cir. 2001) (finding heightened degree of attention where robber confronted witnesses with a gun). During the time that Boatner was face to face with petitioner, petitioner had a gun pointed directly at him, and Boatner's attention would thus have been heightened. J.A. 175-78.

Accuracy of prior description. On the night of the murders, Boatner described his assailant to one of the first-responding officers as "heavy built with his hair with a fade, with a little small top with a lot of gold teeth in his mouth." Mot. Hrg. Tr. 24. Approximately four hours later, when giving his formal statement to Kaufman, he again described his assailant as "a black male with a low [hair]cut [and] golds in his mouth." J.A. 257, 296. That description, Ronquillo testified, is "very close to [petitioner], especially with the haircut

and the golds and the skin color." J.A. 530. At trial, when asked if there was any characteristic in particular he recalled about his assailant, Boatner testified that he had a "mouth full of gold." J.A. 196. Pointing to that statement, petitioner asserts that, "[i]n identifying petitioner, Boatner relied heavily on his belief that [his assailant] had a 'mouth full of gold.'" Pet. Br. 5, 35, 37. That assertion is false: There is no evidence that any of the fifteen photographic lineups presented to Boatner contained pictures showing the teeth of the subjects. Indeed, the record provides evidence to the contrary. J.A. 201, 490.

Moreover, it was only *after* Boatner described this attribute of petitioner that counsel requested petitioner to rise and display his teeth to the jury, whereupon Boatner observed, "Same mouth . . . Same face." J.A. 196. Petitioner, it appears, can explain even this away: "Such characteristics [as low fade haircuts and prodigious gold teeth] could hardly have been sufficient to sustain an identification in and of themselves because they were not uncommon for the time and place." Pet. Br. 37-38. That explanation is as convenient as it is unpalatable.

Level of certainty. At trial, Ronquillo testified to Boatner's certainty when identifying petitioner in lineup 13. According to his testimony, Boatner was "positive of [his] identification" and stated "'This is it. I'll never forget that face.'" J.A. 133. To that last comment, this Court has ascribed particular significance. *See Biggers*, 409 U.S. at 201 ("The victim here, a practical nurse by profession, had an unusual

opportunity to observe and identify her assailant. She testified . . . that there was something about his face 'I don't think I could ever forget.'"). When asked how quickly after seeing petitioner's picture in lineup 13 he was able to make a positive identification, Boatner reiterated the reason for his certainty, "I'll never forget Juan's face, never." J.A. 194. Thereafter, he confidently pointed to petitioner in front of the jury and identified him as the man who "barged in and put a .9mm to [his] head." J.A. 195.

Petitioner finally attempts to call Boatner's identification into question by discussing the June 7, 1995 Times Picayune article, alleging that "the article was accompanied by a photograph of petitioner and implicated him as one of the 'primary suspects' in the shootings." Pet. Br. 38. That allegation is false. The article implicates only "Cut Throat Posse alumni" in the March 1, 1995 murders, and the record indicates petitioner was not a member of that organization. Pet. Br. 53 (citing J.A. 285-87). But whether petitioner was a member of the "Cut Throat Posse" is irrelevant because there is no evidence that Boatner had any knowledge of the existence of Cut Throat Posse or its membership. Moreover, even if the article did implicate petitioner by name, that fact, too, would be irrelevant because Boatner did not read the text of the article prior to making his formal identification on June 28, 1995. J.A. 42-43, 492.

Length of time between the crime and the confrontation. The interval of time between the murders and Boatner's identification of petitioner in a photographic

lineup is admittedly the least compelling indicator of his reliability. However, this Court has upheld, under a totality of the circumstances, an identification made after a greater interval. *See Biggers*, 409 U.S. at 201. In *Biggers*, this Court noted that "a lapse of seven months between the [crime] and the confrontation . . . would be a seriously negative factor in most cases." *Id.* However, where "the victim [has] made no previous [incorrect] identification[,] . . . [his] record for reliability [is] a good one." *Id.* Out of the fifteen lineups shown to Boatner during the investigation of these murders, he identified only one person – petitioner. J.A. 134. Indeed, throughout the process, Boatner displayed a discriminating eye, carefully evaluating and then excluding the photograph of a man with physical features similar to those of his assailant. J.A. 131. Moreover, although a photograph of Robert Trackling was displayed alongside petitioner's photograph in the June 7, 1995 Times Picayune article and a lineup containing Trackling's photograph was presented contemporaneously with the lineup containing petitioner's photograph, petitioner did not identify Trackling as having been among the intruders. That fact supports Boatner's resistance to suggestion as well as his testimony that he only saw the face of one man – petitioner.

1. Larry Boatner's statements on March 1, 1995 do not undermine confidence in the verdict

Petitioner observes that "[w]hen [Detective] Ronquillo interviewed Boatner at the scene, Boatner stated that 'he could not supply a description of the perpetrators other than they were black males.'" Pet. Br. 35 (internal alterations omitted). "All that Boatner could tell [Detective] Ronquillo," petitioner continues, "was that the perpetrators were carrying an AK rifle, a TEC-9-type weapon, and a silver handgun of unspecified size." Pet. Br. 35.

The timing and content of Boatner's statement are significant. Immediately prior to his statement to Ronquillo, Boatner had already given one of the first responders a detailed description of his assailant: He was "heavy built with his hair with a fade, with a little small top with a lot of gold teeth in his mouth." Mot. Hrg. Tr. 24. Boatner described no weapons to the first responder. Yet, later, when speaking to Ronquillo, Boatner described weapons but gave no description of his assailant.

In contrast, approximately four hours after he gave his statements to the first responder and to Ronquillo, Boatner made a formal statement at the Homicide Office:

> Boatner then said that he could not describe any of the subjects, *other than the subject who put the gun in his face*. Boatner described him as being a black male, with a low

> [hair]cut, and golds in his mouth. Boatner then added that they had an AK rifle, a Tech Nine, "Uzzi" type gun, and a chrome, automatic pistol, which Boatner said was the gun that struck him in the head.[30]

J.A. 256-57, 296. Thus, from the maelstrom of the scene and able to reflect calmly on the event he survived, he was able to put together the pieces he had earlier hastily related at the scene.

The circumstances under which Boatner made his statement to Ronquillo reinforce that interpretation of events. Petitioner concedes that "a certain degree of imprecision might be expected from a witness in the immediate aftermath of a violent incident." Pet. Br. 35. That apparent concession understates and sterilizes the traumatic circumstances under which the statement was made: Boatner was still in the house, standing among the bodies of friends whose murders he had witnessed at close quarters mere moments before; Boatner himself only narrowly escaped death; and he was bleeding profusely from a severe and untreated laceration to his head. J.A. 75, 212, 530. How those circumstances actually affected Boatner are presently unknown. Nevertheless, it is not unreasonable to suppose that they did affect him, and to a degree beyond what petitioner suggests.

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[30] Petitioner appears to believe that this statement contradicts Boatner's trial testimony as well. Pet. for Cert. 6 (citing J.A. 296). That reading is only possible by taking Boatner's remarks out of context.

Taken together, the time, content, and circumstances of Boatner's statement to Ronquillo would likely have led a jury to see it for what it was: the words of a man straining under grief, trauma, fear, and pain. That he was "coherent" when he made the statement indicates that he is remarkable, not that he is unreliable.

2. Larry Boatner's statement on March 6, 1995 does not undermine confidence in the verdict

At the heart of petitioner's *Brady* claim is a single statement made by Larry Boatner on March 6, 1995, in which he indicated to Ronquillo that he "could not identify any of the perpetrators of the murder."[21] J.A. 259-60.

When questioned about that statement at post-conviction, Ronquillo, an experienced homicide detective and veteran police officer, seemed untroubled: "At that time, [Boatner] told me he couldn't identify anyone. And to me, that was his not wanting to be involved in this case anymore." J.A. 528. The reasons that Boatner would have desired no longer to be involved in the case are not a matter of record, but

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[21] Petitioner appears to believe that Larry Boatner made two statements to Ronquillo on March 6, 1995. Pet. Br. 35. As Ronquillo's post-conviction testimony makes clear, petitioner's mistaken belief is the result of a simple typographical error in the supplemental report. C.D.C.R. 2911; J.A. 533.

neither would they have been difficult for a jury to infer.[32]

Boatner knew that several armed men had barged into the house on the night of March 1, 1995 and murdered his friends. J.A. 174-83. Although one of the murderers was left critically injured in the house, an unknown number had escaped, and as of March 6, 1995, they remained at large. Boatner feared for his life. J.A. 191, 214. It may be inferred that he also feared that if it were known that he was assisting the police investigation, his fate effectively would have been sealed. That fear was strong enough to drive him to flee New Orleans for a time, and it was only after learning that the murderers had been apprehended that he felt it safe to return. J.A. 191, 214.

Given what Boatner had already survived and the potential dangers he faced, his statements would not likely have affected the outcome. The jury would have weighed Boatner's words against the circumstances under which he made them, his ability to provide a detailed description on the night of the murders, his positive identification of petitioner in a photographic lineup, and the strength of his testimony and his in-court identification. In so doing, they would have seen the inconsistency of Boatner's statement for what it was: the attempt of a frightened

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[32] See John Simerman, *Retrial of Alleged Crime Kingpin Telly Hankton Highlights Weakness of Witness Protection*, Sept. 8, 2011, http://blog.nola.com/crime_impact/print.html?entry=/2011/09/retrial_of_alleged_crime_kingp.html.

man to retreat from danger and to salvage what remained of his life. That Boatner was able to overcome his fear in order to testify does not lessen his credibility; it augments it.

V. Petitioner's Verdict Is Worthy Of Confidence

Petitioner wrongly attempts to cumulate information which cannot be *Brady* material. Petitioner relies upon *Brady* violations in unrelated cases. Petitioner relies on unreliable and inadmissible hearsay. Petitioner relies upon information which he actually possessed or, with the exercise of ordinary diligence, would have obtained prior to his trial. Petitioner relies upon information which is not material to his guilt or punishment and which could not have been used for impeachment. What remains is insufficient to support petitioner's claims, and the jury's verdict is therefore worthy of confidence.

One final observation is in order. Petitioner suggests that he received "summary" treatment in the courts of Louisiana. Pet. Br. 54. He did not. First, the district judge who presided over both his trial and his post-conviction hearing is a veteran jurist who had served for twenty-one years at the time of petitioner's trial and for thirty-five years at the time of petitioner's post-conviction hearing. At trial, he took extraordinary precautions to protect petitioner's constitutional rights. At post-conviction, he allowed petitioner's counsel great latitude in questioning witnesses – permitting

petitioner's counsel to introduce hearsay, to ask leading questions, and occasionally to use exhibits which had not been properly authenticated and for which no foundation had been laid. He also actively questioned both the State's and petitioner's witnesses. In short, petitioner was given every opportunity to which he was lawfully entitled (and more) to undermine confidence in the outcome of his trial. In the end, however, after having presided over petitioner's two-day trial and his four-day post-conviction hearing, after observing the testimony of witnesses, and after observing all of the evidence, the district judge remained satisfied as to the propriety of the State's prosecution. His ruling, too, is worthy of confidence.

Second, petitioner points to the "summary" denials by the Louisiana Fourth Circuit and the Louisiana Supreme Court of his writs from the district judge's ruling, appearing to suggest that those courts never bothered even to read his applications before rushing to deny them. Pet. Br. 26, 54-55. As this Court has recently noted – and as petitioner appears to concede – that suggestion is baseless. *See Harrington v. Richter*, 131 S.Ct. 770, 784 (2011). The rulings of those courts, too, are therefore worthy of confidence.

In the end, petitioner was convicted, not because he was denied a fair trial, but because he is guilty of the crimes with which he was charged. The information to which he points is irrelevant, inadmissible, unsuppressed and unfavorable. What remains confirms petitioner's conviction.

CONCLUSION

The judgment of the state district court should be affirmed.

Respectfully submitted,

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REPLY BRIEF

RECORD
AND
BRIEFS

No. 10-8145

In the Supreme Court of the United States

JUAN SMITH, PETITIONER

v.

BURL CAIN, WARDEN

ON WRIT OF CERTIORARI
TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT
OF LOUISIANA

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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BURL CAIN, WARDEN

ON WRIT OF CERTIORARI
TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT
OF LOUISIANA

REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute the following propositions: (1) the only evidence at trial linking petitioner to the crime was Larry Boatner's identification; (2) on multiple occasions, Boatner had told police he could not identify any of the perpetrators; and (3) Boatner's prior statements were withheld from the defense before trial. Those propositions are all that is required for petitioner to be entitled to relief under *Brady* v. *Maryland*, 373 U.S. 83 (1963). There can be no serious dispute that, if Boatner's prior statements had been disclosed, there is a reasonable probability that the result of petitioner's trial would have been different. Despite respondent's imaginative efforts to conjure up explanations for Boatner's repeated failure to provide any identifying details, Boatner's prior statements directly contradict his testimony

at trial. What is more, those statements were riddled with additional inconsistencies, and the suppressed statements of other witnesses undermined Boatner's identification of petitioner still further.

With no real answer to the core of petitioner's claim, respondent picks away at the margins, contending as to other withheld information that petitioner failed to satisfy the threshold requirements of *Brady*. As respondent candidly admits (Br. 39), however, he did not make any of those arguments in opposing the petition for certiorari, which presented only the question whether the suppressed information was material for *Brady* purposes. Respondent's arguments are therefore forfeited. See S. Ct. R. 15.2. As we will explain, however, those arguments also fail on the merits. If the defense had possessed all of the other information that was suppressed in this case, it could have used that evidence to cast doubt on petitioner's involvement in the murders; on the prosecution's theory that petitioner was one of the shooters; and on the police's motives in identifying petitioner as a suspect in the first place.

When all of the suppressed information is considered together, as *Brady* requires, this is not a close case. The trial court's rejection of petitioner's *Brady* claim was erroneous; the Louisiana courts' summary disposition of that claim verges on the inexplicable. Because the Court can have no confidence in the verdict in this case, it should reverse the judgment of the trial court and order a new trial.

A. The District Attorney's Office Suppressed Information Impeaching The Testimony Of The Only Witness Linking Petitioner To The Crime

1. With regard to Boatner's prior statements—the most important *Brady* material on which petitioner relies—respondent does not contend either that the statements were disclosed before trial or that the statements would not have constituted admissible evidence favorable to petitioner. Instead, in the very last section of his brief, respondent contends (Br. 55-59) that petitioner suffered no prejudice from the failure to disclose the statements—statements that respondent admits were "inconsisten[t]" with Boatner's identification of petitioner at trial (Br. 58). Respondent's contention is invalid.

a. On the evening of March 1, 1995, Officer Ronquillo interviewed Boatner at the scene of the shootings; according to Ronquillo's notes, Boatner told him that he "could not * * * supply a description of the perpetrators other th[a]n they were black males." J.A. 252-253. Although respondent suggests that Boatner merely "gave no description of his assailant" to Ronquillo, Br. 55, Ronquillo's notes reflect that Boatner affirmatively indicated he was *unable* to provide any identifying details at the scene.[1]

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[1] Respondent claims that, "[i]mmediately prior to his statement to [Officer] Ronquillo," Boatner had "already given one of the first responders a detailed description of his assailant." Br. 55; see Br. 3-4, 51. In support of that claim, respondent cites Boatner's testimony at a pretrial suppression hearing. See 10/27/95 Tr. 24 (reproduced in volume 7 of the record received on July 28, 2011). But no other evidence indicates that Boatner provided a statement at the scene other than the one he provided Ronquillo, and Boatner did not repeat that testimony at trial or at the postconviction hearing. It appears, therefore, that Boatner was actually recounting his statement later that evening to Officer Archie Kaufman, in which he stated that the

Respondent does not dispute that, if the defense had been provided the notes in question, it could have used Boatner's statement to contradict his confident identification of petitioner at trial. Instead, respondent suggests that, if the defense had used Boatner's statement for impeachment, the prosecution could have downplayed the statement by arguing that Boatner was "straining under grief, trauma, fear, and pain" at the time he made it. Br. 57. By respondent's own recognition, however, that argument is entirely speculative, because Boatner did not so testify at the postconviction hearing. See Br. 56 (noting that "[h]ow th[e] circumstances actually affected Boatner are presently unknown"). And the mere possibility that the jury *could* have credited such a conjectural argument, in the face of an unambiguous statement directly contradicting the only evidence linking petitioner to the crime, is insufficient to defeat petitioner's *Brady* claim. To obtain a new trial, petitioner need not prove to a certainty that the jury *would* have acquitted him; instead, he need only show that the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995).

In any event, respondent's speculative argument is utterly refuted by the record. At trial, Officer Ronquillo testified that, while Boatner was "shook up" when Ronquillo met him at the scene, he appeared to be "coherent" and "articulated very well the events that had transpired." J.A. 137. Ronquillo added that Boatner "held up very well for what had happened"; "just like any other

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first man through the door had gold teeth and a low-cut haircut. J.A. 296.

witness," Boatner "seemed pretty normal" and "didn't seem out of the ordinary." J.A. 137-138. Respondent is thus asking the Court to discredit what *its own witness* said about Boatner's state of mind at the time of his statement—an invitation the Court should decline.

b. On March 6, Boatner again told Officer Ronquillo that he "could not identify any of the perpetrators of the murder," J.A. 260, and "would not know them if [he] saw them," J.A. 308; that he could not see their faces, *ibid.*; and that he could not even tell if their faces were covered, *ibid.* Although respondent quibbles about whether Boatner made two separate statements to Ronquillo on March 6 or only one,[2] he concedes that Boatner was unable to provide any identifying details as of that date.

As with the March 1 statement, respondent does not dispute that, if the defense had been provided the notes recording Boatner's March 6 statements, it could have used them to contradict Boatner's identification of petitioner. Instead, respondent suggests that, if the defense had used Boatner's statements for impeachment, the prosecution could have minimized those statements' significance by arguing that, having been too traumatized to provide any identifying details at the scene on March 1, Boatner was "frightened" on March 6—and refused to "assist[] the police investigation" in order to "retreat from danger." Br. 58-59. Again, however, respondent acknowledges that his argument is entirely speculative. See Br. 57 (noting that "[t]he reasons that Boatner

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[2] The suppressed documents indicate that Boatner talked to Officer Ronquillo on March 6 at 2:30 p.m. and again at 4 p.m. J.A. 259-260, 308. At the postconviction hearing, Ronquillo testified that the latter indication was "[a]pparently a typo," but did not assert that he had spoken to Boatner only once on that date. J.A. 533.

would have desired no longer to be involved in the case are not a matter of record"). And again, the mere possibility that the jury *could* have credited such a speculative argument cannot defeat petitioner's *Brady* claim.

At any rate, as with the March 1 statement, respondent's explanation for the March 6 statements does not hold water. At the postconviction hearing, Officer Ronquillo testified that Boatner continued to communicate with him for "at least a good month" following the shootings. J.A. 510. During that time, Boatner repeatedly met with Ronquillo to view photographic lineups, including on March 13—just one week after he was purportedly too frightened to cooperate with police. J.A. 122, 184-186. And Boatner himself testified that, upon seeing petitioner's photograph in the New Orleans newspaper in June, he wanted to go looking for petitioner, J.A. 489, 494—hardly the action of a "frightened" person seeking to "retreat from danger."

Respondent suggests that Boatner's fear was "strong enough to drive him to flee New Orleans for a time, and it was only after learning that the murderers had been apprehended that he felt safe to return." Br. 58. But Boatner did not leave New Orleans until June—some *three months* after making the statements at issue. J.A. 190-191. And he returned to New Orleans *before* petitioner was arrested—an arrest that took place only after Boatner himself identified petitioner to Officer Ronquillo. J.A. 273-274; R. 745. There is therefore no valid basis for believing that Boatner was acting out of fear at *any* stage of the investigation—much less on March 6.

2. Confronted with Boatner's facially material prior statements, respondent argues at length (Br. 50-54) that Boatner's identification of petitioner was reliable under *Neil* v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). In so arguing, respon-

dent is tilting at windmills, because petitioner is not arguing here that Boatner's identification was constitutionally *impermissible* (with the result that it should have been excluded from evidence). See Pet. Br. 37-39. Instead, petitioner is arguing only that the identification, while admissible, was of "questionable validity"—and that, as a result, even "additional evidence of relatively minor importance" (much less the considerable evidence adduced here) would be sufficient to undermine the identification and satisfy the *Brady* materiality standard. *United States* v. *Agurs*, 427 U.S. 97, 112-113 (1976).

Respondent cannot seriously contest that more modest proposition, because numerous aspects of Boatner's identification of petitioner as the first man through the door are questionable. To begin with, Boatner had only a limited opportunity to see any of the perpetrators. Although respondent contends that Boatner "spent a considerable amount of time with [his] assailant[s]," Br. 50 (citation omitted), Boatner testified at trial that the perpetrators "rushed in" and he had just "[s]econds" to see them. J.A. 174, 199. Far from getting a good look at the first man, moreover, Boatner was "looking out the corner of [his] eye" while the man was holding a gun to his head, J.A. 177; was "trying to see [the man's] face" after the man forced him to the ground, *ibid.*; and was "look[ing] up at the ceiling" after he got up, J.A. 178.

Consistent with his fleeting glimpse of the first man, Boatner did not provide a "detailed description," as respondent suggests (Br. 55), but instead provided only limited identifying details to the police: namely, that the first man had gold teeth and a low-cut haircut. J.A. 296. Respondent inexplicably takes umbrage (Br. 52) at the suggestion that those characteristics were insufficient to sustain an identification. But respondent does not dispute that at least *five* other suspects had gold teeth and

similar haircuts, thus effectively nullifying the identifying value of those characteristics. J.A. 259, 264, 284, 298.

To the extent Boatner had previously identified petitioner as the first man, moreover, the circumstances surrounding that identification were dubious. First of all, Boatner did not identify petitioner to the police until June 28—nearly four months after the shootings. J.A. 248, 273. And Boatner did so at a time when he was recuperating at a local hospital for patients with "life-threatening" substance-abuse problems, J.A. 192-195, 245—and when, according to notes from a hospital aide, he was feeling "harassed" by the police to identify a suspect, J.A. 247.[3]

In addition, Boatner's ultimate identification of petitioner came almost three weeks after he had allegedly first identified petitioner (upon seeing an article about the case in the New Orleans newspaper). J.A. 187-190, 273. Respondent attempts to bolster that earlier purported identification by arguing that the article did not implicate petitioner. Br. 53. After reviewing the article, however, the trial court squarely concluded otherwise, J.A. 160-161, and the state even stipulated to an instruction at trial that the photographs accompanying the article "depict[ed] possible suspects of" the incident, J.A. 190. Although respondent further argues that the contents of the article are irrelevant because Boatner merely looked at the accompanying photographs, and "did not read the text" of the article, before making his identifica-

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[3] Respondent argues (Br. 39-40) that those notes were available to the defense at the time of trial. Why respondent devotes space to that argument is a mystery, because he acknowledges (Br. 39 n.22) that petitioner did not argue in his opening brief that the notes constitute *Brady* material.

tion, Br. 53, Boatner was plainly aware of the article's contents: he repeatedly testified that the same person who had told him to look at the newspaper had informed him that the article implicated the photographed individuals in the shootings. J.A. 42-43, 487, 497, 501. In short, there is little support for Boatner's confident in-court identification of petitioner—and thus little reason to believe that the jury would have credited that identification if confronted with Boatner's contradictory statements.

3. Respondent makes no effort to explain the other inconsistencies in Boatner's trial testimony revealed by the suppressed statements—inconsistencies that only enhance those statements' materiality. For example, the prior statements demonstrate that Boatner had never previously described the gun carried by the first man as a 9-millimeter handgun, despite so testifying at trial, and that he had previously identified the gun carried by the third perpetrator as a TEC-9, despite testifying at trial that the gun was a MAC-10. See Pet. Br. 39-40. Defense counsel could have used those and other inconsistencies to cast still further doubt on Boatner's credibility as a witness.

4. The prosecution in this case withheld not only the notes recording Boatner's prior statements, but also notes recording statements of two other witnesses, Shelita Russell and Dale Mims, who provided information undermining Boatner's identification of petitioner. Respondents' efforts to discount those notes are unavailing.

a. With regard to Shelita Russell, respondent first contends (Br. 33-35) that her statement would not have been admissible at trial. That contention is forfeited because it was not raised in respondent's brief in opposition and does not appear to have been raised in the Louisiana courts (which would have been better placed to consider

the nuances of Louisiana evidentiary law). But in any event, it lacks merit.

To invoke Louisiana's "dying declaration" exception to the hearsay rule, a party must show that the declarant "believ[ed] that his death was imminent" and that the declarant's statement "concern[ed] the cause or circumstances of what he believed to be his impending death." La. Code Evid. Ann. art. 804(B)(2) (2006 & Supp. 2011). Respondent contends that the former requirement is not satisfied here because "petitioner has offered no evidence that, at the time of her alleged statement, Russell believed her death to be imminent." Br. 34. That is a ludicrous contention. Russell had been shot at least six times, J.A. 77-78, and two witnesses testified at trial that Russell told them in the wake of the shooting that she believed she was about to die, J.A. 102, 182. In addition, the notes clearly reflect that Russell's statement was made at the scene, before she was taken to the hospital (where she lost consciousness and later died). J.A. 310.

Respondent contends (Br. 33-34) that, even if the statement constituted a "dying declaration," it still would have been inadmissible because the notes contained an additional layer of hearsay: *i.e.*, because Officer Ronquillo, who took the notes, allegedly was merely recording what another officer told him Russell had said. If the notes had been disclosed, however, defense counsel could readily have determined which officer had interviewed Russell, whether by seeking that information before trial or by questioning Officer Ronquillo (and, if necessary, other responding officers) at trial. Because the notes either would have been admissible themselves or likely would have led to admissible evidence if they had been produced, they count toward materiality for purposes of *Brady*. See *Wood* v. *Bartholomew*, 516 U.S. 1, 5-6 (1995) (per curiam).

As to materiality, respondent charges that petitioner's reading of the notes—that Russell said the "first person through the door had a black cloth across his face"—is "improbable." Br. 48. *But that is exactly what the notes say.* See J.A. 310 ("black cloth across face — first one through door"). In an effort to reconcile Russell's statement with Boatner's identification, respondent suggests (Br. 48) that, by the "first" man through the door, Russell actually meant the second—either because she was distracted by a telephone call or because Boatner blocked her view of the man who was actually first. But that suggestion is so wildly speculative as to flunk the straight-face test. Russell's statement would have had obvious value in calling into question Boatner's identification of petitioner, and respondent's explanation for the statement borders on "desperate implausibility." *Kyles*, 514 U.S. at 461 (Scalia, J., dissenting).

b. With regard to Dale Mims, respondent first argues (Br. 40-42) that the notes recording his prior statement were not "suppressed" for purposes of *Brady* because defense counsel could have obtained the underlying information through the exercise of "ordinary diligence." That argument is also forfeited because it was not raised in respondent's brief in opposition and does not appear to have been raised in the Louisiana courts. But it too lacks merit.

To be sure, lower courts have recognized a limited range of circumstances in which undisclosed information can nevertheless be said not to have been suppressed for *Brady* purposes because of defense counsel's lack of diligence: for example, where the defense "was fully aware of [a witness's] existence and the substance of his likely testimony." *United States* v. *Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009). In this case, however, there is no evidence that defense counsel was aware that Mims existed,

much less that he had provided favorable information to the police. Respondent cites no case, and we are aware of none, in which a court has held that *Brady* permits the suppression of a material statement by a witness whose existence is unknown to the defense. And respondent's argument is ultimately academic, because his proposed rule would merely convert what would otherwise be a *Brady* claim into a claim of ineffective assistance of counsel—a distinction without a difference, because the materiality standard for *Brady* claims is equivalent to the prejudice standard for ineffective-assistance claims. See *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in the judgment).[4]

Remarkably, respondent argues (Br. 42) that Mims's statement not only was irrelevant to the materiality analysis, but was not even favorable to petitioner. That is yet another newly minted and patently meritless argument. Mims told the police that, immediately after the shooting, he saw a group of men leave the scene and get into the getaway car, "[a]ll" of whom were wearing "ski type" masks that "cover[ed] [the] whole face." J.A. 309; see J.A. 402, 567. Like Russell's statement to the same effect, Mims's statement that the men were masked would have called into question Boatner's identification of petitioner. Respondent suggests (Br. 42) that Mims's statement was consistent with Boatner's identification because Mims testified at the postconviction hearing that "he never saw anyone enter or exit the house." J.A. 402-407. Respondent is seemingly advancing the theory that petitioner could have entered the house *without* a mask,

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[4] In fact, before the trial court, petitioner advanced precisely such an ineffective-assistance claim in the alternative. See R. 367-370.

only to put one on at some point before leaving the scene. But the jury would have been unlikely to credit that theory, because it would be an exceedingly peculiar way to go about an armed robbery.[5]

Mims's statement was only one in a series of suppressed statements that would have thoroughly undermined the testimony of the single witness linking petitioner to the crime. The suppression of those statements alone is sufficient to warrant a new trial.

B. The District Attorney's Office Suppressed Information From An Apparent Perpetrator Suggesting That Petitioner Had Not Been Involved In The Crime

Respondent does not dispute that the district attorney's office also suppressed police notes indicating that Phillip Young had provided information affirmatively suggesting that petitioner was not involved in the shootings. Instead, respondent contends (Br. 35-38, 49-50) that the notes would have been inadmissible at trial and that Young's statement adds nothing to petitioner's showing of materiality. Respondent is incorrect in each respect.

1. Respondent did not directly challenge the admissibility of the notes in his brief in opposition, cf. Br. in Opp. 18 (arguing only that, "even if Young's 'statements' had been disclosed and admissible at trial," they would

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[5] Respondent also contends that Mims could not have seen anyone enter or exit the house "because the door of [the house] was not visible from his vantage point." Br. 42. But Mims testified at the post-conviction hearing that he saw the men only after opening the front door of his house, J.A. 402, and the door of the house where the shootings occurred (the middle house depicted on J.A. 581) is plainly visible from the elevated front stoop of Mims's house (the duplex on the right).

have been immaterial), and does not appear to have done so in the Louisiana courts. Insofar as he belatedly does so now, his arguments are flawed.

As a preliminary matter, respondent suggests that the notes would have failed Louisiana's authentication rule on the ground that Officer Ronquillo testified he "couldn't understand anything that [Young] was saying." Br. 36 (citation omitted). Louisiana's authentication rule, however, merely requires a showing that "the matter in question is what its proponent claims." La. Code Evid. Ann. art. 901(A) (2006 & Supp. 2011). And that rule would have been satisfied here because there has never been any doubt that Officer Ronquillo's notes of his interaction with Young are, in fact, his notes; at the post-conviction hearing, Ronquillo readily admitted as much. J.A. 549.

Respondent next disputes (Br. 37-38) whether, if the defense had called Young and he had been unable or unwilling to testify, Young's statement would have been admissible as a "statement against interest." Specifically, respondent suggests that the statement did not sufficiently "tend[] to subject [Young] to * * * criminal liability" to qualify as a "statement against interest" under Louisiana law. La. Code Evid. Ann. art. 804(B)(3) (2006 & Supp. 2011). In his statement, however, Young did not simply confirm that he was present at the scene of the crime; after acknowledging he understood his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), Young indicated that he had driven his girlfriend's car to the scene (a car that other witnesses identified as the getaway car) and that he knew who the perpetrators were. J.A. 311. All of those answers tended to inculpate Young in the shootings.

In a related vein, respondent suggests (Br. 38) that petitioner could not show that "corroborating circums-

tances clearly indicate the trustworthiness of the statement," as is required for a "statement against interest" of the type at issue here. La. Code Evid. Ann. art. 804(B)(3). But that requirement can be satisfied by "evidence independent of the statement which tends, either directly or circumstantially, to establish a matter asserted by the statement." *State* v. *Hammons*, 597 So. 2d 990, 997 (La. 1992). There was ample corroboration here, because Young's statements that he had driven his girlfriend's car to the scene and that he had been shot by one of the people in the house were consistent with other evidence in the case. J.A. 300-303, 534-536.

2. In challenging the relevance of Young's statement to the materiality analysis, respondent again enters the realm of fantasy. Respondent suggests that Young's negative answer to Officer Ronquillo's question whether "Short Dog" was with him when he went to the house would not "preclude the conclusion that [he and petitioner] arrived separately and murdered together." Br. 49. That is technically true, but it is hard to believe that such a speculative and unsupported theory would have gained any currency with the jury. And a statement need not definitively exculpate the defendant before it can count toward materiality for purposes of *Brady*. See p. 4, *supra*.

In addition, the defense could have used Young's statement not only as exculpatory evidence, but also as evidence calling into question Officer Ronquillo's testimony. Notwithstanding respondent's perplexing assertion to the contrary (Br. 49-50), Ronquillo unequivocally told the jury that Young was not "able to communicate with [him] at all." J.A. 136. Although respondent correctly states (Br. 49-50) that Ronquillo's testimony was "in no way inconsistent with * * * the questions that

he tried to ask Phillip Young," it was indisputably inconsistent with the *answers* he received.[6]

Particularly when combined with the statements undermining Boatner's identification of petitioner as one of the perpetrators, Young's statement seemingly absolving petitioner of responsibility for the shootings would have "undermine[d] confidence in the verdict." *Kyles*, 514 U.S. at 435. The suppression of that statement was also improper.

C. The District Attorney's Office Suppressed Information Undermining The Prosecution's Theory Of The Case

Respondent does not dispute that the district attorney's office withheld information relating to the allegation that, assuming that Boatner's identification of petitioner was accurate, petitioner shot and killed at least one of the victims with a 9-millimeter handgun he was carrying. Instead, respondent argues (Br. 44-47), again apparently for the first time in this litigation, that the information was irrelevant and not favorable. Those arguments lack merit.

1. Respondent contends that any withheld information concerning whether petitioner was one of the shooters was "irrelevant" because the prosecution was not

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[6] Respondent implies (Br. 36-37) that, if the defense had used Young's statement, Officer Ronquillo would have testified that Young's answers were potentially inaccurate due to his incapacitation. At the postconviction hearing, however, Young's nurse testified that, although Young could not speak, he "appeared to understand what you were saying to him" and could answer yes-or-no questions through body movement. J.A. 421, 424. Indeed, police records indicate the very reason Ronquillo visited Young was that Young's nurse had told him Young had begun "communicati[ng] with others." J.A. 272.

required to show that petitioner was one of the shooters. Br. 46-47. To obtain a conviction for first-degree murder under Louisiana law, however, the prosecution must show that the defendant had a "specific intent to kill or inflict great bodily harm." La. Rev. Stat. Ann. § 14:30(A) (2007 & Supp. 2011). It is true that the prosecution can make the necessary showing even where the defendant "has not personally struck the fatal blows." *State* v. *Wright*, 834 So. 2d 974, 982-983 (La. 2002), cert. denied, 540 U.S. 833 (2003). But the prosecution's whole theory as to how the intent element was satisfied *in this case* was that petitioner was one of the shooters. Significantly, respondent identifies no alternative theory for proving the requisite intent, and the record would not support one.[7] Contrary to respondent's contention, therefore, "if the jury had known for a certainty that petitioner had not been one of the shooters," Br. 46-47, it would have been required to acquit him.

2. At trial, the prosecution went to great lengths to prove that petitioner was one of the shooters. Through the testimony of Boatner, the prosecution sought to establish that petitioner was carrying a 9-millimeter handgun—even though, in his numerous undisclosed prior statements, Boatner had never once described the handgun carried by the first man through the door as a 9-millimeter. J.A. 178, 252, 296. Through the testimony of Kenneth Leary, a police firearms examiner, the prosecution sought to establish that casings found at the scene

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[7] The mere fact that petitioner was involved in an attempted armed robbery would be insufficient, because the act of killing in the attempted perpetration of an armed robbery, without more, constitutes only second-degree murder under Louisiana law. See La. Rev. Stat. Ann. § 14:30.1 (2007 & Supp. 2011); *Wright*, 834 So. 2d at 983.

came exclusively from a 9-millimeter handgun—even though, according to undisclosed police notes, Leary had told Officer Ronquillo that the casings had been matched to a machine pistol of the Intratec or MAC-11 type (which another perpetrator had allegedly been carrying), *rather than* a 9-millimeter handgun. J.A. 155, 266. And through the testimony of Alvaro Hunt, a pathologist, the prosecution sought to establish that Russell was shot and killed by bullets fired from a 9-millimeter handgun. J.A. 79-81. The sole purpose of the foregoing testimony was to create the misleading impression that petitioner used a 9-millimeter handgun to kill at least one of the victims.

As to Boatner's failure previously to identify the gun petitioner was allegedly carrying as a 9-millimeter handgun, respondent has no answer. And as to Leary's prior statement matching the casings to a machine pistol of the Intratec or MAC-11 type, respondent's sole contention (Br. 45-46) is that the statement was not favorable to petitioner because such a gun would properly be understood to be a "handgun." In support of that contention, however, respondent relies solely on a definition of "handgun" contained in (and by its terms restricted to) the Louisiana "concealed carry" statute—a statute that had not even been enacted at the time of petitioner's trial. See La. Rev. Stat. Ann. § 40:1379.3(J) (2007 & Supp. 2011) (enacted 1996). Respondent does not dispute that, as a colloquial matter, machine pistols of the Intratec or MAC-11 type would be considered automatic or semiautomatic weapons, rather than handguns. See Pet. Br. 48 n.17. Indeed, that is how Leary himself apparently considered them: in his prior statement, Leary expressly distinguished between "a Inter Tec, 'Mac 11' model type, semi automatic weapon," on the one hand, and a 9-millimeter "handgun" of the type previously seized from Donielle Bannister, on the other. J.A. 266. It is there-

fore clear that Leary's trial testimony matching the casings to a 9-millimeter handgun was inconsistent with his prior statement matching the casings to a machine pistol of the Intratec or MAC-11 type.

If the defense had possessed Leary's and Boatner's prior statements, it would have used them on cross-examination to attack the prosecution's theory of the case, enabling the jury to conclude that petitioner was not one of the shooters and thus lacked the requisite intent for first-degree murder. As with the statements concerning whether petitioner was even present at the scene in the first place, the suppression of those statements was improper.

D. The District Attorney's Office Suppressed Information Indicating That Other Individuals Were Responsible For The Shootings

Finally, respondent contends (Br. 42-44) that the police notes of the interview in which Eric Rogers relayed the confession of Robert Trackling to participation in the shootings were not suppressed and not favorable. That contention is erroneous.

1. Respondent does not dispute that the district attorney's office did not make the notes of the interview available to petitioner until he sought their production in connection with his application for postconviction relief. Respondent nevertheless argues (Br. 42-43) that the notes were not "suppressed" for *Brady* purposes because the interview was conducted in the presence of Rogers's investigator, Samuel Reine, who also served as petitioner's investigator. That argument is forfeited because it was not raised in respondent's brief in opposition and does not appear to have been raised in the Louisiana courts. But in any event, it lacks merit.

To begin with, it is clear that, as of May 19, 1995 (when Officer Byron Adams interviewed Rogers, J.A.

277), Reine was not yet petitioner's investigator, because *petitioner was not even a suspect in the case*—and, *a fortiori*, he had not been arrested, indicted, or appointed counsel or an investigator. Contrary to respondent's disingenuous implication, Reine was therefore not "part of petitioner's defense team" at the time Rogers gave his statement. Br. 43.

In light of the timing of Reine's appointment as petitioner's investigator, respondent's argument rests on an implausible supposition: namely, that when Reine was appointed, he would have recalled, and appreciated the relevance of, a statement of another client several months earlier in which only petitioner's first name was even mentioned. Under those circumstances, Reine's presence at Rogers's interview is surely insufficient to constitute a "disclosure" of *Brady* information, and respondent cites no authority suggesting otherwise. In fact, at least one lower court has squarely held that the presence at an interview of an *attorney* who later comes to represent the defendant is insufficient to constitute a *Brady* disclosure. See *Schledwitz* v. *United States*, 169 F.3d 1003, 1013 (6th Cir. 1999). In the event the Court even considers respondent's forfeited argument, therefore, it should reject it.

2. Respondent also argues (Br. 43) that Rogers's statement was not favorable to petitioner because it "identifie[d] petitioner as a perpetrator" and was therefore "squarely inculpatory." As a preliminary matter, if that were true, one would expect that the prosecution would have tried to use the statement at trial—which it did not. To the contrary, if the notes in question had been disclosed, *the defense* could have used the statement to cast doubt on the proposition that petitioner was "Short Dog"—and thus on the proposition that he was involved in the shootings. According to Rogers, Track-

ling confessed to his own involvement and implicated three others, including "Short Dog." J.A. 281. When Officer Adams asked Rogers to identify "Short Dog," however, Rogers equivocated, initially stating only that Trackling had told him that "Short Dog" was "Juan," and later stating as follows: "Short Dog that's what they call him, they call Robert Home." J.A. 285. And tellingly, when Adams asked Rogers to identify members of the group that was suspected of carrying out the shootings, Rogers listed a number of individuals but not petitioner. J.A. 285-291. To the extent respondent argues that the statement could be given an alternative, inculpatory interpretation, lower courts have consistently held that evidence that "ha[s] both an inculpatory and exculpatory effect" must be disclosed under *Brady*. *E.g.*, *United States* v. *Rivas*, 377 F.3d 195, 199 (2d Cir. 2004).

In addition, if the defense had been provided the notes in question, defense counsel could have spoken to Rogers and learned of Rogers's bombshell allegation that Officer Adams had asked him to implicate petitioner. Respondent contends that, if Rogers had so testified at trial, "the [s]tate would have called [Reine] and Adams * * * to testify truthfully and contradict Rogers." Br. 44. But there is no reason to believe that Reine and Adams would have contradicted Rogers—much less that the jury would have believed them if they did. Significantly, although Adams was by then deceased, respondent did not call Reine at the postconviction hearing to rebut Rogers's contention that the police had sought to frame petitioner. Rogers's statement would therefore have enabled the defense to obtain information that would have undercut the "thoroughness and even the good faith" of the investigation and prosecution—and thereby generated even further doubt about the state's already threadbare case. *Kyles*, 514 U.S. at 445.

* * * * *

When the abundant information that the state withheld in this case is considered as a whole, there is not just a "reasonable probability," but an exceptionally high one, that "the result of the proceeding would have been different" if the information had been disclosed. *Cone* v. *Bell*, 129 S. Ct. 1769, 1783 (2009). In fact, this may be the clearest example of a *Brady* violation that the Court has ever seen. The systematic suppression of favorable information by the Orleans Parish district attorney's office in this case, as in all too many others, was unfair and unjust. It should be remedied with a new trial.

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the trial court should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

JUAN SMITH,
Petitioner,

v.

BURL CAIN, WARDEN,
Respondent.

On Writ of Certiorari to the Orleans Parish Criminal District Court of Louisiana

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioner.[1] The ABA does not address the merits of Petitioner's claims, which must be determined under the post-trial constitutional standards established under this Court's *Brady* jurisprudence. However, the ABA requests that the Court recognize that a prosecutor's pre-trial ethical disclosure obligations, which are established by the attorney regulatory body of the highest court of the prosecutor's state or jurisdiction, are separate from and broader than the Brady constitutional standards.[2]

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in prosecutorial and public defender offices, and in private law firms, corporations, nonprofit organizations, government agencies, and academic institutions. They also include judges, legislators and law students.[3]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] The ethical obligations discussed in this brief include those of the fifty states and the jurisdictions of the District of Columbia, Puerto Rico, the United States Virgin Islands, and Guam.

[3] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA.

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of the American legal system by "[p]romot[ing] competence, ethical conduct and professionalism."[4] Since 1908, when the ABA's CANONS OF PROFESSIONAL ETHICS were adopted, ABA standards have included models for the regulation of prosecutors by their state and jurisdictional highest courts. Now published as the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("ABA Model Rules"),[5] they have been continuously amended and updated, but have always addressed the need for prosecutorial disclosure of exculpatory and mitigating evidence, regardless of materiality.[6]

No member of the ABA Judicial Division Council participated in the preparation of this brief, or in the adoption or endorsement of the positions in this brief.

[4] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[5] The ABA Model Rules, *available at* http://www.Americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html, are developed by task forces composed of members of the ABA and national, state, and local bar organizations, and are then reviewed by academicians, practicing lawyers, and the judiciary prior to presentation to the ABA House of Delegates ("HOD"). The HOD is the ABA's policy making body and is composed of more than 550 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Model Rules become official ABA policy after approval by vote of the HOD. Information on the HOD is available at http://www.americanbar.org/groups/leadership/house_of_delegates.html.

[6] The ABA's CANONS OF PROFESSIONAL ETHICS, *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc

In addition, in 1913, the ABA created a committee now known as the ABA Standing Committee on Ethics and Professional Responsibility, which is charged with, *inter alia*, advising and assisting professional organizations and courts, on request, with their development, modification and interpretation of ethical standards; the Standing Committee also issues formal opinions, on request or on its own initiative, on proper professional and judicial conduct.[7] In 2009, the Standing Committee issued Formal Opinion 09-454, "Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense" ("Formal Opinion 09-454"), which is reproduced at Appendix A.

Another of its efforts is the ABA STANDARDS FOR CRIMINAL JUSTICE ("ABA Criminal Justice Standards"), which are now published in 23 volumes by subject matter.[8] Begun in 1964 under the aegis of

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/Canons_Ethics.authcheckdam.pdf, were amended over time and, significantly updated, were published as the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY in 1969. Further revisions resulted in the ABA MODEL RULES OF PROFESSIONAL CONDUCT, which was first published in 1983. The process of evaluation and amendment continues today. Further information is available at http://www.americanbar.org/groups/professional_responsibility.html.

[7] Further information on the Standing Committee is available at http://apps.americanbar.org/cpr/committees/scepr.html.

[8] The ABA Standards are developed by task forces composed of prosecutors, judges, defense lawyers, academics, the public, and other groups that may have a special interest in the subject, as well as ABA members. The Standards become official ABA policy after approval by vote of the HOD. A history of the development of the Standards is available on the website of the ABA's Criminal Justice Section, at www.americanbar.org/groups/criminal_justice/resources.html. *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST. (Winter 2009) at 10, 14-15 (describing

then-ABA President (and later Justice) Lewis Powell, the ABA Standards represent a collection of "best practices" based on the consensus views of a broad array of professionals involved in the criminal justice system. Standards specifically related to a prosecutor's pre-trial obligations are contained in the volume entitled ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION ("Prosecution Function Standards.").

The ABA Criminal Justice Standards do not reflect a constitutional baseline for judicial evaluation of claims under *Brady v. Maryland*, 373 U.S. 83 (1963) and related case law ("*Brady* claims") concerning a prosecutor's conduct at trial. *Cone v. Bell*, ___ U.S. ___, 129 S. Ct. 1769, 1783 n.15 (2009) (contrasting the constitutional standards under which a court must evaluate *Brady* claims with the "obligation to disclose evidence favorable to the defense [that] may arise more broadly under a prosecutor's ethical or statutory obligations") (citing Standard 3-3.11(a) of the Prosecution Function Standards, and Rule 3.8(d) of the ABA Model Rules).[9] The ABA respectfully requests that the Court continue to recognize that a prosecutor's pre-trial obligations to disclose exculpatory and mitigating evidence "may arise more broadly under a prosecutor's ethical or statutory obligations," *id.*, than is required under the post-trial constitutional standard set out in *Brady*.

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the careful and balanced process by which the Standards are developed and promulgated), which is also available on the Criminal Justice Section website.

[9] Standard 3-3.11(a) and Rule 3.8(d) are quoted and discussed in the Argument, *infra*.

SUMMARY OF ARGUMENT

The present case involves numerous serious allegations of non-disclosure that, post-trial, a court must evaluate under this Court's *Brady* jurisprudence. However, a prosecutor's pre-trial ethical disclosure obligations, as governed by the attorney disciplinary rules of the state or jurisdiction in which the prosecutor practices, are separate from and broader than the constitutional standards. Specifically, ABA Model Rule 3.8(d) mandates disclosure of exculpatory and mitigating evidence without regard to materiality. This Rule's widespread acceptance is reflected in the fact that 49 states, including Louisiana, as well as the District of Columbia, the United States Virgin Islands, and Guam have adopted ethics rules that include a provision identical or substantially similar to it.[10] Similarly, various provisions of the ABA Criminal Justice Standards promote broad disclosure of all exculpatory evidence, without regard to the materiality standard that is required for post-trial analysis under *Brady*. Accordingly, this Court should again recognize that a prosecutor's pre-trial ethical disclosure obligations are distinct from the constitutional standards that control a court's post-trial determination of *Brady* claims.

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[10] See Appendix B, "Jurisdictional Survey of Provisions Analogous to ABA Model Rule of Professional Conduct 3.8(d)" ("Jurisdictional Survey") (listing ethics rules based on ABA Model Rule 3.8(d)).

ARGUMENT

THE ABA REQUESTS THAT THE COURT CONTINUE TO DISTINGUISH BETWEEN PROSECUTORS' *BRADY* OBLIGATIONS AND THEIR BROADER ETHICAL PRE-TRIAL DISCLOSURE OBLIGATIONS

In the present case, Petitioner contends that his conviction should be overturned because the prosecution failed to disclose exculpatory evidence at trial, in violation of *Brady*.[11] While Petitioner's *Brady* claims must be determined under the constitutional materiality standards established by this Court, the ABA requests that the Court again make clear that a prosecutor's pre-trial ethical disclosure obligations are established by the attorney regulatory codes of the prosecutor's state or jurisdiction, and are separate from and broader than the constitutional standards that control a court's post-trial determination of *Brady* claims.

A. Prosecutors Are Bound by the Ethics Rules Established in the Attorney Regulatory Codes of their States and Jurisdictions.

While the post-trial constitutional determination of *Brady* claims must consider the materiality of a non-disclosure, this Court has noted on several occasions that the prosecutor's ethical obligations are broader

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[11] In this amicus brief, the ABA does not address the merits of Petitioner's assertions of substantial *Brady* violations. This should not be seen as an endorsement of Respondent's arguments. Rather, it is solely because the ABA has limited this brief, as a "friend of the court" brief, to consideration of ethics rules and standards applicable to prosecutors.

than those set out in *Brady* and that the "prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone*, 129 S. Ct. at 1783 n.15; *see also United States v. Agurs*, 427 U.S. 97, 108 (1976) (there is a "significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge").

A prosecutor's pre-trial ethical obligations to disclose exculpatory and mitigating evidence are established by the attorney disciplinary rules of the state or jurisdiction in which the prosecutor practices. Most of these rules are patterned on Rule 3.8(d) of the ABA Model Rules,[12] which provides that "[t]he prosecutor in a criminal case shall":

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

Model Rule 3.8(d) reflects the legal community's long-standing consensus, first expressed in the ABA's 1908 CANONS OF PROFESSIONAL ETHICS ("ABA 1908 Canons"), that it would be "highly reprehensible" to allow prosecutors to withhold evidence that might establish a defendant's innocence.[13] Model Rule

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[12] See Appendix B.

[13] ABA 1908 Canons, Canon 5 ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or secreting of

3.8(d)'s widespread acceptance is reflected in the fact that 49 states, as well as the District of Columbia, the United States Virgin Islands, and Guam have adopted ethics rules that include a provision identical or substantially similar to it.[14]

Louisiana, where Petitioner was convicted, was one of the first states to adopt the ABA 1908 Canons, and was "at the forefront of the wave of adoptions" of the ABA's 1969 CODE OF PROFESSIONAL RESPONSIBILITY. Dane S. Ciolino, *Lawyer Ethics Reform in Perspective: A Look at the Louisiana Rules of Professional Conduct Before and After Ethics 2000*, 65 LA. L. REV. 535, 539-41 (2005). In 1987, the Louisiana Supreme Court made effective a version of the ABA Model Rules. *Id.* at 542. Rule 3.8(d) of the Louisiana Rules of Conduct provides in pertinent part that "[t]he prosecutor in a criminal case shall":

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should

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witnesses capable of establishing the innocence of the accused is highly reprehensible").

[14] *See* Appendix B, Jurisdictional Survey. The current rule of the 50th state, California, differs from the Model Rule. However, the Board of Governors of the California Bar has adopted an almost identical version of Model Rule 3.8(d), which is pending approval of the Supreme Court of California. See The State Bar of California, Proposed Rules of Professional Conduct, Adopted by the Board of Governors on July 24, 2010 and September 22, 2010, http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=J2Mhg5NSNdk%3d&tabid=2669. In Puerto Rico, the *Cánones de Ética Profesional*, available at http://www.ramajudicial.pr/leyes/imp-canones-etica-profesional.html, include a rule that is modeled on the 1908 Canon 5, relating to suppression of evidence capable of establishing innocence.

> know, either tends to negate the guilt of the accused or mitigates the offense . . . .

To the extent Louisiana has modified Rule 3.8(d), it has done so (like three other jurisdictions) only to impose more rigorous disclosure obligations on prosecutors.[15] The Louisiana rule thus requires not only disclosure of evidence that the prosecutor "knows" to be exculpatory but also disclosure of evidence that the prosecutor "reasonably should know" is exculpatory.[16] *Id.*

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[15] The District of Columbia and Louisiana require prosecutors to disclose not only exculpatory evidence actually "known" to them, but also evidence that they "reasonably should know." Similarly, North Carolina and Maine require that prosecutors make a "reasonably diligent inquiry" prior to disclosure. Three jurisdictions that have rules based on ABA Model Rule 3.8(d), however, note in accompanying comments or judicial decisions that prosecutors who comply with their constitutional obligations under the *Brady* line of cases are not subject to discipline under the rule. *See* Appendix A, Formal Opinion 09-454 at 11a, n.18 (citing *In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")); *see also Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415 (Ohio 2010).

[16] In *In re Jordan*, the Louisiana Supreme Court found, in addition to *Brady* violations, the same prosecutor who later handled Smith's trial had violated Louisiana Rule 3.8(d) by failing to disclose a homicide eyewitness' statement that conflicted with other statements, and thus "negate[d] her ability to positively identify the defendant in a lineup." 913 So.2d 775, 782 (La. 2005). Noting that this was its first decision involving Louisiana Rule 3.8(d), the court imposed a deferred three-month suspension from the practice of law on the condition that the

The present case involves numerous substantial allegations of non-disclosure that fit squarely within the requirements of Louisiana Rule 3.8(d) and Model Rule 3.8(d). For example, Petitioner contends that the prosecution failed to disclose pre-trial statements by its key eyewitness—who was also the only witness to identify Petitioner—that he was unable to identify any of the perpetrators. These statements would contradict his trial identification of Petitioner. The prosecution also allegedly failed to provide statements from other witnesses that the men who entered the house were all wearing masks, which would contradict the one eyewitness' testimony that he could see Petitioner's face. *Compare* ABA Formal Ethics Opinion 09-454 at 14a (Model Rule 3.8(d) (requires disclosure of statements from eyewitnesses who claim the defendant is not the culprit, even if the prosecutor believes the eyewitness lacked the opportunity to make an accurate identification, and even if other witnesses identify the defendant).

A prosecutor's ethical duty to make disclosures such as these, however, does not depend on their materiality. Louisiana Rule 3.8(d), like Model Rule 3.8(d), does not consider the materiality of the evidence or information. ABA Formal Opinion 09-454 at 11a explains:

> Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to

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prosecutor refrain from further misconduct for the period of one year. *Id.* at 784.

> steer clear of the constitutional line, erring on the side of caution.

As ABA Formal Opinion 09-454 notes, the constitutional materiality limitation under the *Brady* jurisprudence also is absent from the National District Attorneys' Association's disclosure standard. *Id.* at n.22, quoting NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged.").

By requiring prosecutors to disclose more than material exculpatory evidence, the ABA Model Rules seek to avoid pitfalls that might arise if a prosecutor attempts to determine materiality before making a disclosure. As commentators have highlighted, assessing materiality pre-trial requires prosecutors to "anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place 'the whole case' in a different light." Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609 (2006). In addition, "compared to a neutral decision maker, the prosecutor will overestimate the strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose disclosure is at issue. As a consequence, the prosecutor will fail to see materiality where it might in fact exist." Burke, *id.* at 1612; *see also* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*,

6 OHIO ST. J. CRIM. L. 467, 488 (2009) ("Tunnel vision has had an obvious impact in the pretrial stage: having formed an initial judgment that a particular defendant is guilty of a crime, prosecutors and police will tend to discredit or discount the significance of new exculpatory evidence or fit it into their preexisting theory.").

Indeed, some lower courts have required pre-trial disclosure of favorable evidence without a determination of materiality. For example, the federal district court in *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005), asserted that "the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial." *See also United States v. Sudikoff*, 36 F. Supp. 1196, 1199 (C.D. Cal. 1999) (*Brady*'s post-trial "analysis obviously cannot be applied by a trial court facing a pretrial discovery request"). *But see Boyd v. United States*, 908 A. 2d 39, 61 (D.C. 2006) ("Materiality is an issue at the time that the prosecutor makes a determination regarding what he must disclose to the defense . . . .").

In short, a prosecutor's ethical pre-trial disclosure obligations under Model Rule 3.8(d), like its state and jurisdictional counterparts, are separate from and broader than the constitutional *Brady* obligations. Model Rule 3.8(d) "requires disclosure of evidence and information favorable to the defense without regard to the anticipated impact of the evidence or information on the trial's outcome." Formal Opinion 09-454 at 12a (footnotes omitted).

B. The ABA Criminal Justice Standards, which Reflect the Consensus Views of Criminal Justice Practitioners, Also Promote the Goals of the Ethics Rules.

The ABA Criminal Justice Standards reflect the consensus views of broadly representative task forces of criminal justice practitioners.[17] These standards, like Model Rule 3.8(d) and the ethics rules patterned on it, promote the broad disclosure of all exculpatory evidence, without regard to the materiality standard set forth in *Brady*. For example, Standard 3-3.11(a) of the Prosecution Function Standards states:

> A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

As the Commentary to Standard 3-3.11 explains, "[t]his [disclosure] obligation, which is virtually identical to that imposed by ABA model ethical codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id.* (internal footnote omitted) (citing *United States v. Agurs*, 427 U.S. 97 (1976)).[18] The basis for this obligation is that "a prosecutor has the responsibility of a minister of justice

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[17] *See* footnote 8, *supra*.

[18] The Commentary to Standard 3-3.11 also notes, "The National District Attorneys Association similarly requires prosecutors to 'disclose the existence or nature of exculpatory evidence pertinent to the defense.'" *Id.*, (citing NATIONAL PROSECUTION STANDARDS § 25.4); *see also* discussion of absence of materiality limitation in NDAA Prosecution Standard 53.5, *supra*.

and not simply that of an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, including consideration of exculpatory evidence known to the prosecution." *Id.* (internal footnotes omitted); *see also* Standard 3-1.2(b) (prosecutor is an "administrator of justice, an advocate, and an officer of the court"); Standard 3-1.2(c) (prosecutor's duty is to "seek justice, not merely to convict").[19]

In addition to Standard 3-3.11's disclosure obligations, Standard 3-5.6(a) states: "A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity." As stated in the Commentary to Standard 3-5.6, the obligation to not knowingly offer or fail to seek withdrawal of false evidence "applies to evidence that bears on the credibility of a witness as well as to evidence on issues going directly to guilt." *Id.* (citing *Napue v. Illinois*, 360 U.S. 264 (1959)). This Commentary continues: "Even if false testimony is volunteered by the witness and takes the prosecutor by surprise, if the prosecutor knows it is false, it is the prosecutor's obligation to see that is it corrected."

In the present case, Petitioner contends that prosecutors allowed a police investigator to testify at trial

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[19] Reflecting these same concerns, Comment [1] to Model Rule 3.8 recognizes that the prosecutor's responsibility as a "minister of justice" carries with it "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence," and "that special precautions are taken to prevent . . . the conviction of innocent persons."

that an injured perpetrator was in a "vegetative state" and unable to communicate, while the investigator's undisclosed notes reflected communications by that perpetrator that indicated that Petitioner was not involved in the crimes. Not only would this implicate Standard 3-5.6(a), as well as the ethical disclosure obligations of Model Rule 3.8(d) and Standard 3-3.11, it would also be contrary to Louisiana Rule 3.3 and ABA Model Rule 3.3, which mandate counsel's candor to the tribunal.[20] ABA Model Rule 3.3(a)(3) states in pertinent part that a lawyer shall not knowingly:

> (3) offer evidence that the lawyer knows to be false. If the lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Finally, as stated in Prosecution Function Standard 3-1.2(e), in pertinent part, "It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction."[21] This duty "to know and

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[20] Rule 3.3 of the Louisiana Rules of Professional Conduct is substantially identical to ABA Model Rule 3.3. *See* LOUISIANA RULES OF PROF'L CONDUCT R. 3.3 (2011).

[21] The ABA notes that, because of the critical importance of a prosecutor's knowledge of both pre-trial ethical and constitutional *Brady* disclosure obligations, the ABA recently adopted policy that encourages trial courts to foster compliance through pretrial conferences with the parties to "ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions, and to offer the court's assis-

be guided by" includes not only the constitutional *Brady* disclosure standards but also, in the ABA's view, the ethical pre-trial disclosure obligations of the prosecutor's state or jurisdiction.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the Court continue to distinguish between a prosecutor's separate and broader pre-trial ethical disclosure obligations, as established by that prosecutor's attorney regulatory codes, and a prosecutor's constitutional post-trial *Brady* obligations.

Respectfully submitted,

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tance in resolving disputes over disclosure obligations." 2010 ABA Midyear Report with Recommendation #102D (Recommendation adopted Feb. 2010), *available at* http://www2.americanbar.org/sdl/Documents/2010_MY_102D.pdf. Similarly, the ABA adopted policy that encourages trial courts to use written checklists "delineating in detail the general disclosure obligations of the prosecution" and to create standing committees "of local prosecutors and criminal defense attorneys to assist the court in formulating and updating the written checklist." 2011 ABA Midyear Report with Recommendation # 104A (Recommendation adopted Feb. 2011), *available at* http://www2.americanbar.org/sdl/Documents/2011_MY_104A.pdf.

APPENDIX

APPENDIX A

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-454 **July 8, 2009**

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution.[1] Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." This obligation may overlap with a prosecutor's other legal obligations.

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*,[2] which held that criminal defendants have a due process right to receive favorable information from the prosecution.[3] This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule.[4] Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely ad-

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[2] 373 U.S. 83 (1963). *See State v. York*, 632 P.2d 1261, 1267 (Or. 1981) (Tamer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

[3] *Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also Kyles v. Whitley*, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

[4] *See* Arizona State Bar, Comm. on Rules of Prof'l. Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof'l Ethics, Op. E-86-7 (1986).

dress the scope of the ethics rule.[5] Finally, although courts sometimes sanction prosecutors for violating disclosure obligations,[6] disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

The Committee undertakes its exploration by examining the following hypothetical.

> A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the

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[5] *See, e.g., Mastracchio v. Vose*, 2000 WL 303307 *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close to violating [Rule 3.8]").

[6] *See, e.g., In re Jordan*, 913 So. 2d 775, 782 (La. 2005) (prosecutor's failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); *N.C. State Bar v. Michael B. Nifong*, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm'n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); *Office of Disciplinary Counsel v. Wrenn*, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re Grant*, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution). *Cf.* Rule 3.8, cmt. [9] ("A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.")

> defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant's consent to the prosecutor's noncompliance with the ethical duty eliminate the prosecutor's disclosure obligation?

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal.[7] In the hypothetical, information known to the prosecutor would be favorable to the defense but is not neces-

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[7] *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35, *United States v. Bagley*, 473 U.S. 667, 674-75 (1985).

sarily material under the constitutional case law.[8] The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[9] Similarly, Comment [1] to Model Rule 3.8

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[8] "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense . . . . [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (citations omitted); *see also United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.")

[9] *Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than

states that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland*,[10] the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is don included an obligation not to suppress facts capable of establishing the innocence of the accused.[11] This

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150 years. *See, e.g., Rush v. Cavanaugh*, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

[10] Prior to *Brady*, prosecutors' disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. *See, e.g., Jencks v. United States*, 353 U.S. 657, 668, n. 13 (1957), *citing* Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done;" *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) ("While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.")

[11] ABA Canons of Professional Ethics, Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not

obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.[12]

Over the course of more than 45 years following *Brady*, the Supreme Court and lower cowl issued many decisions regarding the scope of prosecutors' disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but

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to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.")

[12] *See, e.g.*, OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) ("a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics"). For example, *Brady* required disclosure only upon request from the defense — a limitation that was not incorporated into the language of DR 7-103(B), *see* MARU, *id.* at 330 — and that was eventually eliminated by the Supreme Court itself. Moreover, in *United States v. Agurs*, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, *id.*

do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,"[13] and most importantly, "that special precautions are taken to prevent . . . the conviction of innocent persons."[14] A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promote the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence an arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

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[13] Rule 3.8, cmt. [1].

[14] *Id.*

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d)[15] establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation.[16] The ABA

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[15] For example, Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal . . . ." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

[16] This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. *See Cone v. Bell*, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.[17]

In particular, Rule 3.8(d) is more demanding than the constitutional case law,[18] in that it requires the disclosure of evidence or information favorable to the

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[17] The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id.* at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

[18] *See, e.g., United States v. Jones*, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the *Brady* line of cases. *See In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (*en banc*) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof I Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

defense[19] without regard to the anticipated impact of the evidence or information on a trial's outcome.[20] The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.[21]

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[19] Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that "mitigates the offense." Evidence or information mitigates the offense if it tends to show that the defendant's level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

[20] Consequently, a court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). *See, e.g., U.S. v. Barraza Cazares*, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer's statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

[21] *Cf. Cone v. Bell*, 129 S. Ct. at 1783 n. 15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 (prosecutors should avoid "tacking too close to the wind"). In some jurisdictions, court rules and court orders serve a similar purpose. *See, e.g.*, Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining "exculpatory information," for purposes of the prosecutor's pretrial disclosure obligations under the Local Rules, to include (among other things) "all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof.[22] Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence[23] or assist

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the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

[22] Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

[23] For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to

him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, *supra*, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires

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enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances."[24] Although "a lawyer cannot ignore the obvious,"[25] Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires prosecutors to disclose known evidence and information that is favorable to the accused,[26] it does not require prosecutors to conduct searches or investiga-

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[24] Rule 1.0(f).

[25] Rule 1.13, cmt. [3], cf. ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

[26] If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

tions for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.[27]

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[27] Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.[28] Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty.[29] Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the

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[28] *Compare* D.C. Rule Prof I Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof I Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

[29] *See* ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

prosecution's case,[30] timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment.[31] Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order.[32]

Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply.[33] For example, may the

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[30] In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel — that is, they provide access to all the documents in their case file including incriminating information — to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. See N.C. Gen. Stat. § 15A-903 (2007); *see generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

[31] *See* JOY & MCMUNIGAL, *supra* note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

[32] Rule 3.8, Comment [3].

[33] It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may

prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client[34] or another.[35] Rule 3.8(d) is

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require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In *United States v. Ruiz*, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in *Giglio v. United States*, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

[34] *See, e.g.*, Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. *See, e.g.*, Rule 1.7(b)(1).

[35] *See, e.g.*, Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,[36] with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.[37]

The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, *e.g.*, information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant

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[36] *See* Rules 1.2(a) and 1.4(b).

[37] The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, "in connection with sentencing," i.e., after a guilty plea or verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.[38]

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[38] The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove

The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.[39] Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,[40] and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.[41] To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed.

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aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

[39] Rules 5.1(a) and (b).

[40] Rule 5.1(b).

[41] Rule 5.1(c). *See, e.g., In re Myers*, 584 S.E.2d 357, 360 (S.C. 2003).

Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.[42]

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[42] In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). *See, e.g.*, Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).

APPENDIX B

Jurisdictional Survey of Provisions Analogous to ABA Model Rule of Professional Conduct 3.8(d)

Jurisdiction	Rules	Provision Analogous to ABA Model Rule 3.8(d)
Alabama	Alabama Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
Alaska	Alaska Rules of Professional Conduct	Rule 3.8. Special Responsibilities of a Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Arizona	Arizona Rules of Professional Conduct	Ethics Rule ("ER") 3.8. Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Arkansas	Arkansas Rules of Professional Conduct	Rule 3.8. Special Responsibilities of a Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
California	California Rules of Professional Conduct	Rule 5-110 Performing the Duty of Member in Government Service Rule 5-200 Trial Conduct . . . (B) Shall not seek to mislead the judge, judicial officer, or jury by an

		artifice or false statement of fact or law; Rule 5-220 Suppression of Evidence A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.
Colorado*	Colorado Rules of Professional Conduct	Rule 3.8. Special Responsibilities of a Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Connecticut	Connecticut Rules of Professional Conduct	Rule 3.8. Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (4) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

Delaware	Delaware Lawyers' Rules of Professional Conduct	Rule 3.8. Special responsibilities of a prosecutor The prosecutor in a criminal case shall: . . . (1) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Florida	Florida Rules of Professional Conduct	4-3. Advocate Rule 4-3.8 Special Responsibilities of a Prosecutor . . . (c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
Georgia	Georgia Rules of Professional Conduct	RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the

		defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense.
Hawaii	Hawaii Rules of Professional Conduct	**Rule 3.8. PERFORMING THE DUTY OF PUBLIC PROSECUTOR OR OTHER GOVERNMENT LAWYER.** A public prosecutor or other government lawyer shall: . . . (b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
Idaho	Idaho Rules of Professional Conduct	**RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR** The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Illinois	Illinois Rules of Professional Conduct	Rule 3.8. Special Responsibilities of a Prosecutor . . . (c) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense.
Indiana	Indiana Rules of Professional Conduct	Rule 3.8. Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Iowa	Iowa Rules of Professional Conduct	Rule 32:3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to

		negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Kansas	Kansas Rules of Professional Conduct	3.8 Advocate: Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
Kentucky	Kentucky Rules of Professional Conduct	SCR 3.130(3.8) Special responsibilities of a prosecutor The prosecutor in a criminal case shall: . . . (c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this

		responsibility by a protective order of the tribunal;
Louisiana*	Louisiana Rules of Professional Conduct	Rule 3.8. Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Maine*	Maine Rules of Professional Conduct	3.8 Special Responsibilities of a Prosecutor The prosecutor shall: . . . (b) make timely disclosure in a criminal or juvenile case to counsel for the defendant, or to a defendant without counsel, of the existence of evidence or information known to the prosecutor after diligent inquiry and within the prosecutor's possession or control, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment;
Maryland	Maryland Rules of Professional Conduct	Rule 3.8 Special Responsibilities of a Prosecutor. The prosecutor in a criminal case shall:

		. . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
Massachusetts	Massachusetts Rules of Professional Conduct	Rule 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Michigan	Michigan Rules of Professional Conduct	Rule 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose

		to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Minnesota	Minnesota Rules of Professional Conduct	Rule 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Mississippi	Mississippi Rules of Professional Conduct	Rule 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

Missouri	Missouri Rules of Professional Conduct	Rule 4-3.8: Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Montana	Montana Rules of Professional Conduct	Rule 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Nebraska	Nebraska Rules of Professional Conduct	Rule 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the

		defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Nevada	Nevada Rules of Professional Conduct	**Rule 3.8. Special Responsibilities of a Prosecutor.** The prosecutor in a criminal case shall: . . . (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
New Hampshire	New Hampshire Rules of Professional Conduct	**Rule 3.8. Special Responsibilities of a Prosecutor** The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information

		known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
New Jersey	New Jersey Rules of Professional Conduct	RPC 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: (d) make timely disclosure to the defense of all evidence known to the prosecutor that supports innocence or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
New Mexico	New Mexico Rules of Professional Conduct	Rule 16-308 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . D. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

New York	New York Rules of Professional Conduct	DR 7-103 [1200.34] Performing the Duty of Public Prosecutor or Other Government Lawyer. . . . B. A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.
North Carolina*	North Carolina Revised Rules of Professional Conduct	27 NCAC 02 Rule 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
North Dakota	North Dakota Rules of Professional Conduct	Rule 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . .

		(d) disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Ohio[6]	Ohio Rules of Professional Conduct	Rule 3.8: Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall not do any of the following: . . . (d) fail to make timely disclosure to the defense of all evidence or information *known* to the prosecutor that *tends* to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, fail to disclose to the defense all unprivileged mitigating information *known* to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the *tribunal*;
Oklahoma	Oklahoma Rules of Professional Conduct	Rule 3.8. Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all

		unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Oregon	Oregon Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor The prosecutor in a criminal case shall: . . . (b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
Pennsylvania	Pennsylvania Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

Rhode Island	Rhode Island Disciplinary Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
South Carolina	South Carolina Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
South Dakota	South Dakota Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the

		defense of all evidence or information known to the prosecutor that tends to exculpate the guilt of the accused, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged exculpatory information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Tennessee	Tennessee Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor. The prosecutor in a criminal matter: . . . (d) shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, shall disclose to the defense and, if the defendant is proceeding *pro se*, to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
Texas	Texas Disciplinary Rules of Professional Conduct	Rule 3.09 Special Responsibilities Of A Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when

		the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
Utah	Utah Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor. The prosecutor in a criminal case shall: . . . (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
Vermont	Vermont Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
Virginia	Virginia Rules of Professional Conduct	Rule 3.8 Additional Responsibilities Of A Prosecutor. A lawyer engaged in a prosecutorial

		function shall: . . . (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
Washington	Washington Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
West Virginia	West Virginia Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosures to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all

		unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
Wisconsin	Wisconsin Rules of Professional Conduct for Attorneys	Rule 3.8 Special Responsibilities Of A Prosecutor. . . . (f) A prosecutor, other than a municipal prosecutor, in a criminal case or a proceeding that could result in deprivation of liberty shall: (1) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
Wyoming	Wyoming Rules of Professional Conduct for Attorneys at Law	Rule 3.8 Special Responsibilities Of Prosecutor. The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this

		responsibility by a protective order of the tribunal; and
District of Columbia[9]	District of Columbia Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor. The prosecutor in a criminal case shall not: . . . (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Puerto Rico	Código de Ética Profesional	Canon 5. Conducta como defensor o fiscal. . . . La supresión de hechos o la ocultación de testigos capaces de establecer la inocencia del acusado es altamente reprochable. Será también altamente reprochable que un abogado defensor o fiscal produzca ante un tribunal prueba falsa, con pleno conocimiento de su falsedad. La intervención indebida por un abogado o fiscal con sus testigos o los de la parte contraria es intolerable.

Virgin Islands	Virgin Islands Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
Guam	Guam Rules of Professional Conduct	Rule 3.8 Special Responsibilities Of A Prosecutor The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

* The District of Columbia and Louisiana require prosecutors to disclose not only exculpatory evidence actually "known" to them, but also evidence that they "reasonably should know." Similarly, Maine and North Carolina require that prosecutors make a "reasonably diligent inquiry" prior to disclosure. Three jurisdictions that have rules based on ABA Model Rule 3.8(d), however, note in accompanying comments or judicial decisions that prosecutors who comply with their constitutional obligations under the Brady line of cases are not subject to discipline

under the rule. *See* Appendix A, Formal Opinion 09-454 at 11a, n.18 (citing *In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")); *see also Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415 (Ohio 2010).

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

JUAN SMITH, PETITIONER

v.

BURL CAIN, WARDEN, RESPONDENT

ON WRIT OF CERTIORARI TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT OF LOUISIANA

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members[2] are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network promotes study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

The Innocence Network works to ensure that innocent persons are not wrongfully convicted or incarcerated and thus has an interest in the enforcement of obligations under *Brady v. Maryland*,

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[1] Pursuant to Rule 37.3, the parties have both consented to the filing of this amicus brief. The letters of consent from both parties accompany this filing. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici and their members, has made a monetary contribution to the preparation or submission of this brief.

[2] The member entities are listed in the appendix.

373 U.S. 83 (1963). In the experience of Innocence Network member, New Orleans Innocence Project, the consistent and repeated violations of *Brady* in Orleans Parish have led to an alarming rate of wrongful convictions. Since 1990, ten convicted prisoners have been exonerated from prison in Orleans Parish. All of those prisoners were exonerated due to violations of *Brady* by the prosecution at their trial.[3]

Equally as critical, the experience of the Innocence Network has also found the unfortunate but substantial role that mistaken eyewitness identifications play in wrongful convictions. Indeed, Innocence Project research shows that eyewitnesses misidentified 75 percent of people who were wrongfully convicted and exonerated by DNA evidence. The *Brady* exonerations in Orleans Parish and the prevalence of eyewitness identifications among exoneration cases highlight the degree to which violations of *Brady* in eyewitness cases can undermine our system of justice, and the concomitant necessity of enforcing defendants' rights to evidence in the government's possession that is material and favorable to their defense.

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[3] See cases discussed *infra*, note 11.

SUMMARY OF ARGUMENT

While the application of the *Brady* doctrine's requirement that prosecutors disclose impeachment and exculpatory evidence is important for all criminal cases, its significance cannot be overstated in those cases in which prosecutors rely upon a single eyewitness for identification of the defendant and have no corroborating forensic evidence. In those cases, any information that casts doubt on the reliability or credibility of that eyewitness' identification is by its nature material. By withholding *Brady* information that could be used to challenge the credibility of the prosecution's single eyewitness and the reliability of that witness' identification of the defendant, the prosecution undercuts the defendant's right to due process and undermines the integrity of the trial.

As described in detail in petitioner's brief,[4] only a single eyewitness identified petitioner and no forensic evidence linked petitioner to the crime. Therefore, the jury's consideration of the truthfulness and credibility of the testimony of that witness, Larry Boatner, and the reliability of his identification were the fundamental factual issues in dispute. The jury either had to decide to believe his identification or not. But the jury heard a seemingly confident Boatner make his identification without knowing that three times previously Boatner had told the police that he could not make an

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[4] The Innocence Network hereby adopts by reference the statement of the case and the facts set forth in petitioner's brief, as well as the Joint Appendix adopted by petitioner.

identification. J.A. 252-253, 25-260, 308. The jury also did not hear contradictory statements from other witnesses (including a dying victim) about whether the assailant in question wore a mask, J.A. 309, 310, and a statement from a suspected perpetrator suggesting that petitioner was not involved in the crime. J.A. 311. This undisclosed information, both individually and collectively, would have undermined the reliability and credibility of the prosecution's single eyewitness.

Social science has repeatedly shown that while juries place substantial weight on an eyewitness' identification, such eyewitness identifications are often wrong. For example, the U.S. Department of Justice previously analyzed twenty-eight cases involving convicted defendants who were later exonerated by DNA evidence. The Department found that "eyewitness testimony was the most compelling evidence" but that "[c]learly, however, those eyewitness identifications were wrong." See Edward Connors et al., U.S. Dep't of Justice, Pub. No. NCJ 161258, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 24 (1996). Similarly, a recent study of the first 250 cases in which defendants were exonerated by DNA evidence found that eyewitnesses misidentified 76 percent of the exonerees.[5] See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011).

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[5] Professor Garrett's findings are consistent with the Innocence Project's own findings. See *infra*, note 6.

Memory is malleable. An eyewitness' seemingly confident identification is affected by intervening factors such as police statements that the correct suspect was identified or whether the eyewitness previously had seen a photo of a police suspect. Although the advent of DNA evidence has exonerated many in recent years, innocent people are still convicted in the United States on the testimony of a single eyewitness, especially in cases, such as this one, that do not involve DNA evidence or other forensics. *Brady* acts as a firewall in these cases by preventing the prosecution from withholding evidence that would impeach or contradict the testimony of the single witness upon which it relies. Particularly in cases "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Application of *Brady* in single (or few) eyewitness cases ensures that defendants are provided access to evidence that contradicts or undercuts otherwise seemingly confident, but mistaken, or even false, identifications.

The *Brady* standard is clearly met in this case, where the testimony of a single eyewitness was critical and the prosecution withheld information that could have been used to impeach and contradict that eyewitness. The jury should have been allowed to consider and evaluate *all* evidence concerning the reliability and credibility of Boatner's identification. Withholding that evidence may lead to an easy

conviction, but this tactic does not lead to verdicts in which the courts should have confidence.

ARGUMENT

I. THE PROSECUTION'S WITHHOLDING OF INFORMATION THAT UNDERMINED THE TRUTHFULNESS, CREDIBILITY AND RELIABILITY OF ITS SINGLE EYEWITNESS IS MATERIAL UNDER *BRADY*

A. *The Prosecution Impermissibly Preserved Boatner's Truthfulness, Credibility and the Reliability of His Identification in the Eyes of the Jury By Withholding Exculpatory Information*

This case demonstrates the critical importance of disclosing *Brady v. Maryland* material in cases involving the identification of a defendant by a single eyewitness. 373 U.S. 83 (1963). *Brady* provides that suppression of evidence favorable to the accused violates due process where the evidence "is material either to guilt or to punishment." *Id.* at 87. Withheld evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)). The Court clarified in *Kyles* that the reasonable probability standard does not test "whether the defendant would more likely than not have received a different verdict with the evidence," but rather "whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* There can be no confidence in the verdict in a case such as petitioner's, where the

prosecution hinged its case on a single eyewitness and artificially preserved that witnesses' credibility, truthfulness and reliability by withholding evidence that specifically undermined those virtues.

As detailed in petitioner's brief, the only evidence connecting petitioner to the crime of which he was convicted was the eyewitness testimony of Larry Boatner identifying petitioner. Pet'r's Br. 34-35. No other witnesses testified to corroborate Boatner's identification of the petitioner, and there were no fingerprints or other forensic evidence linking petitioner to the crime. Rather, the jury was asked to convict the petitioner based solely on the testimony of this single eyewitness. Accordingly, the critical issues of fact before the jury were: is Boatner's testimony credible and truthful, and is his identification of a man at whose face he claimed to have "glanced" for only a few moments reliable? J.A. 308.

Yet the information withheld by the prosecution from the defense went precisely to these issues: the credibility and truthfulness of that eyewitness, and the reliability of his identification. Among other favorable evidence, the prosecution withheld prior statements by Boatner that conflicted with his trial testimony, J.A. 252-253, 259-260, 308, and evidence of the statements of other witnesses that contradicted Boatner's testimony. J.A. 309, 310, 311.

In a case involving a horrific crime scene with five dead victims, a severely injured perpetrator, and no forensic evidence linking petitioner to the crime, J.A. 139, the prosecution obtained a conviction on

the basis of a single eyewitness' identification, but did not provide the defense with the information necessary to cross-examine that witness effectively or to introduce testimony from other witnesses that contradicted his statements. Without having seen the evidence that would undermine the credibility and reliability of Boatner's identification, the jury convicted petitioner.

B. *Confident Eyewitness Identifications Can Be Powerful Evidence, But Are Often Wrong*

The impact of Boatner's identification of petitioner at trial was overwhelming and the effect on the jury was no doubt dramatic. Boatner testified:

> Q: Larry, do you see the person in the court today who barged through that door that day and put a .9mm to your head?
>
> A: Yes, I do.
>
> Q: Point him out for the jury.
>
> A: He's right there. Like I say, I'll never forget him.
>
> * * *
>
> Q: Larry, is there any doubt in your mind whatsoever, any doubt at all, that Juan Smith is the man that came to the door that day at 2230 North Roman Street?
>
> A: No doubt.

J.A. 195-196.

An unequivocal identification by a witness is powerful evidence in the mind of a juror. Justice Brennan discussed the effect of a confident eyewitness on a jury in his dissent in *Watkins v. Sowders*:

> Eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says "that's the one!"

449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (citations omitted); see also C. A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence*, *in* Adult Eyewitness Testimony 348, 348 (David Frank Ross at al. eds., 1994) ("jurors tend to rely heavily on eyewitness confidence to infer witness accuracy").

Jurors place a great weight on the apparent confidence of an eyewitness despite the long recognized fact, as this Court has acknowledged, that "the annals of criminal law are rife with instances of mistaken identifications." *United States v. Wade*, 388 U.S. 218, 228 (1967). In a recent study of the first 250 cases in which defendants were exonerated after conviction by DNA evidence, Professor Brandon L. Garrett found that eyewitnesses misidentified 76 percent of the

exonerees (190 of 250 cases).[6] See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011). Of these 190 cases, Professor Garrett found that as many as 64 percent involved conviction based on the identification of a single eyewitness. *Id.* at 50. Professor Garrett's analysis of these cases demonstrates that eyewitness identifications are highly fallible and yet play a major role in the wrongful convictions of exonerees.[7] In its own study published two years before Professor Garrett's, the Innocence Project found that not only was eyewitness misidentification a prevalent occurrence in DNA exoneration cases, but the eyewitness misidentification alone was the central cause of conviction in 50 percent of DNA exoneration cases where eyewitness misidentification was a factor.[8]

---

[6] These figures are consistent with the Innocence Project's own findings that 75 percent of DNA exonerations were at least partially supported by eyewitness testimony. Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 3 (2009).

[7] As Professor Garrett noted, exoneration through DNA evidence is most likely to occur in rape cases where DNA material can be collected, and that exoneration is less likely to occur in other types of cases, such as murder, not because eyewitnesses are more reliable in murder cases, but because DNA evidence is less likely to be available in those cases. Garrett, *supra*, at 81.

[8] The other examined factors that contributed to wrongful convictions were invalidated or improper forensic science, false confession or admission, and informant testimony. These causes played a role in the conviction of the other 50 percent of eyewitness misidentification. cases. Innocence Project, *Reevaluating Lineups, supra* note 6, at 17.

Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 17 (2009).

The U.S. Department of Justice in its own analysis of exoneration cases found that not only are eyewitness misidentifications prevalent, but they are often the most significant evidence that supported the wrongful convictions. In its study of twenty-eight cases involving convicted defendants who were later exonerated by DNA evidence, the Department of Justice found that "eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong." Edward Connors et al., U.S. Dep't of Justice, Pub. No. NCJ 161258, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 24 (1996). In a subsequent Department of Justice report, Attorney General Janet Reno explained:

> Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory.

Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide For Law Enforcement*, at iii (1999).

C. *Eyewitness Testimony that Results in Convictions Is Frequently Mistaken or False*

Although Boatner was unequivocal in his trial testimony that petitioner was the perpetrator, a large body of research has shown that witness certainty in an identification bears minimal if any correlation to its accuracy or reliability. See, e.g., Luus & Wells, *supra*, at 348-61; Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 1, 15-16 (1998). In his book, Professor Garrett analyzed the trial transcripts of those convicted and later exonerated by DNA evidence. In the trials with eyewitness testimony, by the time of the trial almost all of the eyewitnesses were positive that they had identified the right person. Garrett, *supra*, at 68. However, in 57 percent of these trials, the witnesses had earlier not been certain at all about their identification, "a glaring sign that the identification was not reliable." *Id.* at 64.

Moreover, analysis of exoneration cases has shown that in a significant percent of cases, exonerees were convicted on the basis of eyewitnesses who were lying. In a study of 340 exoneration cases from 1989 to 2002, researchers concluded that in at least sixty cases, persons who claimed to have witnessed the crime falsely accused the defendant deliberately at trial. Samuel L. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543 (2005). In murder cases, especially, Professor Gross and his colleagues found that exonerees had

been falsely accused by eyewitness in forty-three percent of the cases (44 out of 102). *Id.*

D. *The Prosecution Withheld Prior Statements by Boatner and Others that Would Have Allowed the Jury to Fully Evaluate the Truthfulness, Credibility and Reliability of Boatner's Identification of Petitioner*

In contrast to Boatner's unequivocal identification of petitioner at trial, the newly disclosed materials reveal that on three prior occasions, Boatner provided statements to the police in which he unambiguously asserted that he could not identify any of the perpetrators. Police records reflect that on the day of the crime, Boatner told Officer John Ronquillo that he "could not . . . supply a description of the perpetrators other th[a]n they were black males." J.A. 252-253. On a second occasion, police notes taken five days after the crime state that Boatner only "glanced" at the first man who had entered the house, that he could not tell if the men had their "faces covered" and he "didn't see anyone," and that he "could not ID anyone because [he] couldn't see faces." J.A. 308. Under the same caption, the notes describe that Boatner told Ronquillo again that he "could not ID" and that he "would not know them if [he] saw them." *Id.* A third piece of withheld evidence concerns a statement made by Boatner to Ronquillo that he "could not identify any of the perpetrators of the murder." J.A. 259-260. Each of these three undisclosed prior statements all dramatically conflict with the certainty with which Boatner claimed to be able to identify petitioner at trial. J.A. 196.

The prosecution also withheld prior statements of two other eyewitnesses that contradict Boatner's testimony and undermine his identification of petitioner. Police notes of an interview with Shelita Russell, who was critically injured and later died as a result of the shootings, reveal that she told police that the "first one through [the] door" had a "black cloth across [his] face." J.A. 310. Given Ms. Russell's subsequent death, this statement could only be found in the police notes. Also withheld were notes from a police interview with Dale Mimms, a neighbor, which reveal that he told the police that all of the men he saw exit the house were wearing "ski type" masks that "cover[ed] [the] whole face." J.A. 309. Both of these statements contrast heavily with Boatner's testimony at trial that the first perpetrator who came to the door was petitioner and that that person was not wearing a mask. J.A. 175; see also Petr'r's Br. 36-37.

Further, the prosecution withheld notes of Officer Ronquillo's conversation with Phillip Young, a suspected perpetrator who was severely injured at the scene of the crime but survived. J.A. 271-273, 311. The notes reflect that Young was not only able to communicate – in conflict with Ronquillo's testimony at trial that Young could not communicate, J.A. 136 – but also that he indicated to police that a specified group of people (including a person whom the police believed to be petitioner) was "not with [him] when [he] went to the house." J.A. 311. A statement by an apparent perpetrator seemingly absolving petitioner of responsibility for the shootings would have combined well with other information undermining Boatner's identification of

petitioner as one of the perpetrators. See also Petr'r's Br. 43-45.

Other undisclosed information undermines Boatner's trial testimony about the weapon that he alleged petitioner used at the crime. Boatner testified at trial that the first man who entered the house was carrying a 9-millimeter handgun and that he "kn[e]w" what a 9-millimeter "looks like." J.A. 178. But police notes disclose that in prior statements he had only ever described the gun as a "silver colored handgun," J.A. 252, or a "chrome automatic." J.A. 256-257. He also had told police "that he could not supply any additional information" on the weapon other than that it was "a silver colored handgun." J.A. 252-253.

The prosecution also withheld notes of Officer Ronquillo's conversation with Firearms Examiner Kenneth Leary, J.A. 266, which directly undermine the reliability of Boatner's testimony at trial. J.A. 178. The notes show that Leary had "advised Ronquillo that the 9MM ammunition confiscated from the Roman Street murder was typed to have been fired from a[n] Inter Tec, 'Mac 11' model type, semi automatic weapon" and thus not a 9-millimeter handgun. J.A. 266. However, Boatner testified at trial that the petitioner was carrying a 9-millimeter handgun. J.A. 178. This information suggests that Boatner's trial testimony about the weapon was a product not of his own recollection, but of influencing

conduct by police and prosecutors. See also Petr'r's Br. 45-49.[9]

Research has confirmed that mock jurors exposed to inconsistent statements by witnesses are significantly less likely to convict and find the defendant less culpable and the eyewitness less effective. See Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. Applied Psychol. 170, 170 (1996). Inconsistent statements affect juror conviction rates not only in instances where the witness contradicted himself, but also when the witness provided information on the stand that it did not provide in pretrial investigations. *Id.* at 173. In one study, the conviction rate when mock jurors were exposed to inconsistent testimony regarding central details like the target's appearance was less than half of the conviction rate than when they were exposed to consistent testimony regarding those central details. Garrett L. Berman et al., *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability and Verdicts*, 19 Law & Hum. Behav. 79, 85 (1995). When the eyewitness gave inconsistent statements going to both central and peripheral details, the conviction rate by the mock jurors was then halved again. *Id.*

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[9] Other inconsistencies between his descriptions of the guns at trial and in prior undisclosed statements, discussed more fully in the Petitioner's Brief, pages 39-40, further reveal a significant fault line in the credibility of Boatner's testimony and the reliability of his identification of petitioner.

E. *Social Science Research Suggests that Boatner's Identification of Petitioner May Have Been a Result of Intervening Factors and Not Independent Recollection*

At trial, Boatner was confident about his identification of petitioner, and that his assailant was brandishing a 9-millimeter gun, both pieces crucial to the prosecution's theory that led to petitioner's conviction. J.A. 178, 195-196. However, the undisclosed information reveals that far from being certain, when Boatner spoke to police just after the incident, he was uncertain of his ability to identify his assailant and gave vague and conflicting descriptions about the gun his assailant carried. J.A. 252, 256-257. The undisclosed notes from Firearms Examiner Leary further reveal that the lethal weapon in the shootings might not have been a 9-millimeter at all. J.A. 266. Boatner's progression from undisclosed uncertainty to overt and persuasive confidence at trial suggests that his identification of petitioner was influenced by suggestive police behaviors and other intervening factors, and not his independent recollection.

Social science research has shown that eyewitness certainty in identifications is not only fallible, it is one of the most malleable features of human memory, and DNA exoneration cases provide solid illustration. Much research has gone into the intervening reasons for the certainty progressions, such as the one that the newly disclosed materials reveal regarding Boatner's testimony. Suggestive behaviors by police in the identification procedures account heavily for this progression. In the DNA

exoneration cases for which he was able to obtain trial records, Professor Garrett found that 78 percent of trials with eyewitness testimony involved at least one form of police suggestion. Garrett, *supra*, at 55. Police feedback upon correct identification is one type of suggestive behavior that social scientists have directly accredited with creating confident but mistaken eyewitness. For example, witnesses are especially likely to say they had an adequate or excellent view of the culprit or paid special attention to the culprit's face if police confirm their choice out of a lineup with positive feedback, like "Good, you identified the actual suspect." Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360 (1998); see also Amy Breadfield et al., *The Damaging Effects of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112, 117 (2002) ("feedback significantly diminishes the strength of the certainty-accuracy relation"). The notes from the hospital where Boatner was treated relating to the harassment and pressure he felt surrounding the police identification procedures suggest that Boatner's identification of petitioner was similarly coaxed by police behavior. J.A. 247; see also Pet'r's Br. 38.

Another intervening factor that may lead to eyewitness misidentification is a phenomenon called "unconscious transference," or more colloquially the "mugshot exposure effect." See Elizabeth Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 4-14 (2007); Kenneth A. Deffenbacher et al., *Mugshot*

Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287 (2006). This effect occurs when a witness confuses or recalls a person seen in one situation with a person seen in a second situation. Deffenbacher et al., *Mugshot Exposure Effects, supra,* at 289. It has been studied in relation to criminal trials because witnesses are often exposed to a suspect's photograph either in the media or by the police in such forms as mugshot books before they are asked to make an identification. The witness then makes an unconscious commitment to that picture and later identifies that suspect based on recognition from the prior picture and not independent recollection. Thus, "[i]f a witness is exposed to mugshots subsequent to viewing a perpetrator and prior to an additional test of recognition memory, there is a possibility that exposure to that mugshot may bias the witness's decision at that test." *Id.* at 287.

In this case, there is substantial reason to believe that the "mugshot exposure effect" influenced Boatner's belated identification of petitioner. On or around June 7, 1995, Boatner obtained a copy of the New Orleans Times-Picayune that contained an article accompanied by a picture of petitioner and three others. J.A. 160-161, 190, 582-583. The article implied that petitioner was a suspect in the shootings. *Id.* It was only after Boatner saw this picture, and almost four months after the shootings, that he made his identification to police—and even then, only after police visited him in the hospital; Boatner never went to the police on his own. J.A. 193-194. A large body of research has shown that

the ability of witnesses to retain identifying information decreases substantially even after only a few days, much less several months. See Matthew P. Gerrie et al., *False Memories, in* Psychology and Law: An Empirical Perspective (Neil Brewer & Kip Williams eds., 2007) ("We have known for over 100 years that memories fade, sometimes rapidly, in a function known as the forgetting curve . . . [and] that as memories fade, they also become more susceptible to suggestion."); Daniel L. Schacter, *The Seven Sins of Memory*, 54 Am. Psychol. 182, 184 (1999) ("It has also been established that forgetting can occur quite rapidly. . . .").

Evidence going to the existence of intervening factors such as police harassment and mugshot exposure become all that much more potent in cross-examination when accompanied by evidence that a witness, while certain in his identification on the stand, was vague and not at all certain in his initial recollection of the perpetrator. It is precisely this type of evidence that the prosecution withheld by failing to disclose Boatner's previous statements about his ability to identify his assailant. See Section I.D.

F. *Social Science Research Shows that the Witnessing Conditions in Boatner's Situation Weaken an Eyewitness' Ability to Identify a Perpetrator*

In the notes of Boatner's March 2, 1995 interview with Detective Arthur Kaufman, which were withheld from the defense, Boatner said that he was "too scared to look at anybody" and was only able to recall the complexion of the perpetrators' skin

and that the first person who put a gun to him had "a low cut" and "gold[s] in his mouth." J.A. 295-296. At the end of the interview, he lamented that he "wish[ed he] could give [the police] a description." J.A. 297. Boatner described the immense stress and fear he felt during the perpetration of the crime, which prompted a biological reaction even before the shooting began. J.A. 177-178.

Studies have found that heightened stress situations such as the one in which Boatner found himself produce a debilitating effect on the accuracy of an eyewitness' recall of details of the event, as well as on the accuracy of any identification of the target that the witness is able to make. See Garrett, *supra*, at 72; Kenneth Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004); Roger B. Handberg, *Expert Testimony on Eyewitness Indentification*, 32A Crim. L. Rev. 1013, 1019 (1995) ("when one is concerned with self-preservation, there is a tendency to ignore anything not necessary for survival"); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 265, 274 (2004) ("Contrary to popular conception that most people would never forget the face of a clearly seen individul who had physcially confronted them for more than 30 min, a large number of subjects in this study were unable to correctly identify their perpetrator.")

Other studies have shown that when a crime is committed with a weapon, the witness' attention becomes focused on the weapon and substantially less on the characteristics and appearance of the

perpetrator. See Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413 (1992). The undisclosed materials suggest that a weapons focus effect might have played a role in Boatner's witnessing conditions. In contrast to his initial inability to identify a perpetrator, Boatner was able to describe each of the guns that the perpetrators were carrying, including such characteristics as gun type, color and the type of clip (though even then, Boatner gave different descriptions of the guns over time). J.A. 296.

In addition, the overwhelming majority of eyewitness identification experts agree that the less time an eyewitness has to observe an event, the less well he or she will remember it. See Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115, 120 (2006); see also Amina Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 Brit. J. Psychol. 339 (2003). By his own account, Boatner had just "[s]econds" to see the perpetrators, who "rushed in" when he opened the front door and almost immediately forced him and the others to the ground. J.A. 174, 199.

G. *All of the Withheld Information in this Case Provide a Reasonable Basis for a Jury to Determine Boatner's Identification Was Unreliable or that Boatner Was Not Credible*

As social science has shown, eyewitness identification testimony, while highly effective with juries, may often be unreliable. In this case, the withheld information directly implicated the credibility and truthfulness of the witness and the reliability of the identification including inconsistent prior statements by Boatner himself and the conflicting statements of other witnesses. But because of the prosecution's decision to withhold this information, the jury only saw the confident Boatner, not the equivocal Boatner who could not initially identify petitioner, or the other witnesses who contradicted him.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). By withholding the contested evidence, the prosecution was able to present a credible version of Boatner's story, and denied petitioner the ability to seek out the truth through cross-examination in the process of defending himself. See *id.* at 320. Social science research finding that a discredited eyewitness is not as influential as one that is unchallenged buttresses the value of cross-examination at trials. See Bernard E. Whitley Jr., *The Effects of Discredited Eyewitness Testimony: A Meta-Analysis*, 127 J. Soc. Psychol. 209 (1987).

Had the withheld information been made available, there is a reasonable probability that the defense would have been able to cross-examine, impeach and ultimately "destroy[] confidence in [Boatner's] story." *Kyles*, 514 U.S. at 443; see *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (noting that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"). Instead, in this single eyewitness case, the government hobbled the defense, created a one-sided trial, and, ultimately, undermined confidence in the verdict.

H. *In a Single Eyewitness Case, Evidence Undermining the Credibility and Truthfulness of a Witness and the Reliability of His Identification Is Highly Material under Brady*

The Court has repeatedly looked at whether a witness is central to the prosecution in determining whether previously undisclosed evidence going towards the witness's credibility is material. In *Giglio v. United States*, the Court recognized that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general [*Brady*] rule." 405 U.S. 150 (1972) (citing *Napue*, 360 U.S. at 269). In *Kyles*, this Court suggested that there is a heightened expectation of consistency in the testimony of a witness when, "by the State's own admission, [the witness is] essential to the investigation and indeed 'made the case' against [the defendant]." 514 U.S. at 445. The existence of several inconsistencies in that witness' testimony was "[c]ontrary to what one might hope

for from such a source." *Id.* The Court assessed the "likely damage" of inconsistent statements by two other eyewitnesses in *Kyles* by referring first to the fact that the prosecution contended during closing arguments that they were "the State's two best witnesses." *Id.* at 444.

In *United States v. Agurs*, as well, the Court described a scaled approach to materiality based on how critical a witness is to the prosecution: the more essential a witness' testimony is, the more likely undisclosed impeachment information would be material. 427 U.S. 97 (1976). This Court held that a reviewing court should evaluate the prosecution's suppression of evidence "in the context of the entire record"—and, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient" to satisfy the materiality standard. *Id.* at 112-113. As an illustration, the Court referred to a comparison of examples discussed in a law review comment:

> If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not

> be sure as he had only had a brief glimpse, the result might well be different.

Id. at 112 n. 21 (citing Victor Bass, Comment, Brady v. Maryland *and The Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 125 (1972)).

In petitioner's case, Boatner was not only the State's principal witness, but its *only* witness linking petitioner to the crime scene. Thus, the situation was very much like the hypothetical from the law review comment discussed in *Agurs*: the prosecution introduced the testimony of a single eyewitness identifying the defendant, but withheld evidence that would undermine the key witness' testimony, including testimony from other eyewitnesses.

Where there is only a single witness linking a suspect to a crime, withholding information concerning the credibility of that witness is more likely to be material than in a case such as *Kyles*, in which four eyewitnesses identified the defendant, but the *Brady* material did not relate to all of these eyewitnesses. In his dissent in *Kyles*, Justice Scalia reasoned that, even if the prosecution's key witness had been thoroughly impeached by the undisclosed evidence, and the jury did not believe his testimony, the jury still could have convicted the defendant "because it could not believe that *all four* of the eyewitnesses were similarly mistaken." 514 U.S. at 463 (Scalia, J. dissenting). By contrast in this case, Boatner was not simply the prosecution's key witness; rather, he was the *only* witness who linked petitioner with the crime.

I. *Eyewitness Misidentification Takes a Harsh Toll on Those Wrongfully Convicted*

Eyewitness misidentification has led to the wrongful conviction of many individuals who have served lengthy sentences only to later be exonerated through the discovery of exculpatory evidence. In fact, The Innocence Project, has assisted in the exoneration of many such individuals.

Larry Mayes received a 110-year sentence for crimes he did not commit based on a witness's unreliable identification. *Mayes v. City of Hammond*, 442 F. Supp. 2d 587, 617-18 (N.D. Ind. 2006) (discussing history of Mayes's case in his § 1983 suit against the city and officials arising out of his wrongful conviction); Profile of Larry Mayes, Innocence Project, http://www.innocenceproject.org/Content/Larry_Mayes.php (last visited Aug. 15, 2011). Similar to petitioner's case, the victim and sole eyewitness was only able to give a basic description of her assailant. *Mayes*, 442 F. Supp. 2d at 602. The victim was initially unable to identify Mayes in a live lineup, relating that "[she] was nervous. [That she] wanted to get it over with and get out of there." *Mayes*, 442 F. Supp. 2d at 616; Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Online Appendix 40-41 (2011), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_eyewitness_appendix.pdf

Subsequent police testimony in related civil cases revealed that the victim's initial photo identifications had been "tentative," a fact that the prosecution had not disclosed in violation of its *Brady* obligations.

Mayes, 442 F. Supp. 2d at 631-32. Mayes was incarcerated for nearly twenty-one years for a crime he did not commit.

In another case of witness misidentification, Michael Blair was sentenced to death after being wrongfully convicted of capital murder in Texas. *Ex parte Blair*, Nos. AP-75954, AP-75955, 2008 WL 2514174, at *1 (Tex. Crim. App. June 25, 2008) (per curiam); Profile of Michael Blair, Innocence Project, http://www.innocenceproject.org/Content/Michael_Blair.php (last visited Aug. 15, 2011). The prosecution's main evidence against Blair was the testimony of three eyewitnesses who claimed to have seen Blair on the same day the victim disappeared and in the same park where the victim was discovered dead. See Profile of Michael Blair, *supra*. However, these witnesses did not identify Blair in a photo lineup until after his picture had already appeared in the media, and at least two of the witnesses testified that they had seen Blair's photo on the television before identifying him to police. *Id.*; Garrett, Online Appendix, *supra*, at 8. Subsequent evidence pointed to Blair's innocence for that crime, and eventually he was removed from death row. *Ex Parte Blair*, 2008 WL 2514174, at *2.

Like the Mayes and Blair cases, petitioner's situation is one in which the prosecution rested much of its case on an eyewitness—Boatner—despite the unreliability and inconsistency that newly disclosed materials now reveal. Such unreliability becomes particularly problematic when its existence is wrongfully withheld by the prosecution at trial, rendering a defendant incapable of adequately defending himself in violation of his constitutional

due process rights. In such circumstances, there can be no confidence in the verdict.

Eyewitness identification testimony will, of course, continue to play an important role in criminal trials, but given the increasing understanding that this form of evidence is less reliable than it may seem, it is critical that defendants be given access to materials that may be used to impeach or contradict these witnesses. The protections in *Brady* are significant resources for defendants in combating the highly prejudicial effect of mistaken eyewitness identifications and resulting testimony. Providing the defense with access to information that may be used to impeach or contradict eyewitnesses may be the most effective means to combat eyewitness misidentifications in cases in which DNA evidence is not available.

II. THE HISTORY OF THE ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE DEMONSTRATES A PATTERN OF WITHHOLDING EVIDENCE THAT WOULD UNDERMINE THE CREDIBILITY OF KEY WITNESSES AND THE RELIABILITY OF THEIR IDENTIFICATIONS

The Orleans Parish District Attorney's Office under the prior leadership of Harry Connick has a long and documented history of disregarding *Brady* obligations.[10] Since 1990, the discovery of *Brady*

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[10] The failure of the Orleans Parish District Attorney's Office to observe *Brady's* mandates under Connick's tenure are well-documented in this Court's recent decision in *Connick v. Thompson*, 131 S. Ct. 1350 (2011). There, Connick's office admitted that it had improperly withheld evidence in violation of *Brady*, which resulted in the wrongful conviction of John Thompson, who spent 18 years in prison, including 14 years on death row. *Id.* at 1355. The Court recognized that "during the ten years preceding [Thompson's] armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office." *Id.* at 1360. In fact, Connick's own "testimony exposed a flawed understanding of a prosecutor's *Brady* obligations," as he misstated *Brady's* requirements and even admitted to previously withholding evidence, which resulted in the U.S. Attorney's Office indicting him for doing so. *Id.* at 1378 (Ginsburg, J., dissenting). Other prosecutors in Connick's office were similarly – or even further – deficient in their understanding of their *Brady* obligations. One senior prosecutor erroneously testified that impeachment evidence was not *Brady* material and that there was no obligation to turn over police reports revealing inconsistent descriptions of the perpetrator. *Id.* Another senior prosecutor "admitted that he never reviewed police files, but simply relied on police to flag any potential *Brady* information." *Id.* The lack of *Brady* understanding is unsurprising as Connick's attorney manual

violations committed by Orleans Parish prosecutors at trial has contributed to the exoneration of ten individuals following reversal of their convictions.[11]

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included only four sentences on *Brady* which were "notably inaccurate, incomplete, and dated," and the manual did not even acknowledge that impeachment evidence is material under *Brady*. *Id.* As the Court noted, "Connick resisted an effort to hold prosecutors accountable for *Brady* compliance because he felt the effort would 'make his job more difficult.'" *Id.* at 1381 (quoting trial record).

[11] The Orleans Parish *Brady* exonerees are: **Dan Bright**, see *State v. Bright*, 875 So. 2d 37 (La. 2004) (murder conviction reversed by state supreme court after nine years due to undisclosed evidence impeaching the State's main witness; Bright was released from prison and later exonerated); **Greg Bright and Earl Truvia**, see Case No. 252-514 (on file with Orleans Parish Criminal District Court); see also Michael Perlstein, *Open to Appeal; Convicted criminals Say DA Policy Change Gives Them Fair Shot*, Times-Picayune (New Orleans), July 20, 2003, at 1 (murder convictions reversed by state trial court after twenty-seven-and-a-half years due to undisclosed evidence impeaching the State's main witness; Bright and Truvia were released from prison and later exonerated); **Shareef Cousin**, see *State v. Cousin*, 710 So. 2d 1065 (La. 1998); see also, *In re Jordan*, 913 So. 2d 775 (La. 2005) (murder conviction reversed by state supreme court after four years due to trial record errors, but disciplinary proceedings against prosecutor cited numerous *Brady* violations; Cousin was released from prison and later exonerated); **Roland Gibson**, see Case. No. 203-904 (on file with Orleans Parish Criminal District Court); see also Dan Bennet, *Jailed Man Granted New Trial in '67 Murder Sues the State*, Times-Picayune (New Orleans), Feb. 17, 1993, at B1; *Gibson v. State*, 731 So. 2d 379 (La. Ct. App. 1999) (civil case) (murder conviction reversed by state trial court after twenty-six years due to undisclosed evidence implicating another person in the crime; Gibson was released from prison and later exonerated); **Isaac Knapper**, see *State v. Knapper*, 579 So. 2d 956 (La. 1991) (murder conviction reversed by state supreme court after twelve years due to

A closer examination of Orleans Parish cases involving *Brady* violations in general reveals an alarmingly common practice of withholding material impeachment information in cases that are built primarily on the testimony of eyewitnesses, including cases in which only a single eyewitness testifies. In these cases, information impeaching the credibility and reliability of eyewitness testimony is critical, and the prosecution's suppression of this information undermines confidence in the verdicts.

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undisclosed evidence implicating other people in the crime and impeaching the state's main witness; Knapper was released from prison and later exonerated); **Curtis Lee Kyles**, see *Kyles v. Whitley*, 514 U.S. 419 (1995) (murder conviction reversed by Supreme Court after eleven years due to undisclosed evidence impeaching the state's witnesses and implicating another person in the crime; the state dropped charges against Kyles after unsuccesaful efforts to retry him); **Dwight Labran**, Case No. 388-287 (on file with Orleans Parish Criminal District Court); see also Keith Pandolfi, *Innocence Project New Orleans Investigates Suspected Cases of Wrongful Convictions*, New Orleans City Business, Jan. 13, 2003 (murder conviction reversed by state trial court after four years due to undisclosed evidence impeaching the State's main witness; Labran was released from prison and later exonerated); **John Thompson**, see *State v. Thompson*, 825 So. 2d 552 (La. Ct. App. 2002) (murder and robbery convictions reversed by state trial and appellate courts after seventeen years due to undisclosed forensic evidence; Thompson was acquitted at a retrial); **Hayes Williams**, Case No. 199-523 (on file with Orleans Parish Criminal District Court); see also William Pack, *Prison Reformer Faces Challenge of Freedom*, The Advocate (Baton Rouge), May 16, 1997 (murder conviction reversed by state trial court after thirty years due to undisclosed exculpatory witness statements; Williams was released from prison and later exonerated). This data was collected by the Innocence Project New Orleans; none of these exonerations occurred through the use of DNA evidence.

A. *The Orleans Parish District Attorney's Office Has Withheld Evidence of Prior Statements of Key Witnesses that Conflicts With Their Trial Testimony or Undermines Their Credibility and Reliability*

In several cases, Orleans Parish prosecutors have withheld statements of critical key witnesses which contradicted their trial testimony, thereby preventing impeachment and impermissibly preserving the credibility of that witness.

One recent case, *State v. Lindsey*, is particularly noteworthy. Eugene Lindsey was convicted of murder for killing the mother of his girlfriend after engaging in a domestic dispute. 844 So. 2d 961, 961-62 (La. Ct. App. 2003). Counsel for Lindsey put forth a combined defense of intoxication and accidental shooting, but prosecution witnesses testified that Lindsey was not intoxicated and that the family had not consumed alcohol that evening. *Id.* at 962-63. Following Lindsey's conviction, however, it was discovered that two of the state witnesses provided pretrial statements to police that contradicted their trial testimony and corroborated Lindsey's claim that he was intoxicated. *Id.* at 964-65. The Court of Appeal of Louisiana held that the evidence withheld was material exculpatory evidence under *Brady* and reversed the district court's denial of post-conviction relief. *Id.* at 969.

Orleans Parish prosecutors have also withheld prior statements of its key witnesses which could strongly show that their trial testimony is unreliable. Of particular note are two cases similar

in core aspects to petitioner's. In both cases, the prosecution hinged its case on a single eyewitness identification, and withheld evidence that severely undercut the reliability of that witness' identification.

In *State v. Curtis*, Larry Curtis was convicted of second-degree murder based on testimony of the victim's brother, who was the only witness to identify Curtis as the shooter. 384 So. 2d 396, 397 (La. 1980). Another witness testified to seeing the defendant flee the scene. *Id.* The withheld *Brady* material in that case consisted of evidence that the sole eyewitness identifying the defendant as the shooter had failed to identify the defendant from a photographic display before trial. *Id.* The Louisiana Supreme Court reversed the conviction finding that that the reliability of the sole eyewitness was likely the "crucial factor" in determining the guilt of the defendant and that the prior failure to identify the defendant weakened the reliability of that identification. *Id.* at 398; see also *State v. Falkins*, 356 So. 2d 415, 418-20 (La. 1978) (holding that the state's failure to produce witnesses' initial misidentification of the defendant deprived the defendant of a fair trial where the sole basis of the conviction was the eyewitness testimony).

In the second case, *State v. Cousin*, 710 So. 2d 1065 (La. 1998), the *Brady* violation largely tracks the facts of the suppression of evidence in petitioner's case. Shareef Cousin was convicted of first-degree murder and sentenced to death. *Id.* at 1066. The victim and Connie Babin were returning to the victim's car after dinner when three individuals confronted them. *Id.* At trial, Babin

testified that while she was fleeing she turned briefly towards the assailants and witnessed the defendant shoot the victim in the face. *Id.* No physical evidence was presented. *Id.*

The prosecution team in *Cousin* was headed by Roger Jordan, who was also the lead prosecutor in petitioner's case. Although the reliability of Babin's identification was the key issue in *Cousin*, Jordan withheld from the defense Babin's prior statements which indicated that she did not have a good recollection of the gunman's features. *Id.* at 1066. In a pretrial statement taken immediately following the shooting, Babin told police that she "did not get a good look at the perpetrators and probably could not identify them." *In re Jordan*, 913 So. 2d 775, 777 (La. 2005). In a statement a few days later, Babin further elaborated:

> I don't know, it was dark and I did not have my contacts nor my glasses so I'm coming at this at a disadvantage. . . . I keep getting this vision of a young man with, with an older mans face.. I don't know that if this is coming . . . somewhere, or if I really did see this person . . . if this is just coming from my imagination or what, but I . . . every time I go over it and close my eyes . . . I remember thinking that he had an older man's face or a young body, on a young person . . . how I visualize that, I don't know[.]

Id. at 777. In post-trial proceedings, Jordan testified that he believed these pretrial statements, replete with qualifications and stammering confusion, "tended to corroborate her identification of Mr. Cousin" as the gunman and did not constitute *Brady*

material. *Id.* at 778. Roger Jordan was personally sanctioned by the Louisiana Supreme Court for failing to disclose the key witness' prior statements. See *id.*

The Supreme Court of Louisiana determined that the withholding of this information was a *Brady* violation because it cast doubt on Babin's veracity as the key eyewitness, and defense counsel could have easily used the pretrial statements to impeach her testimony during trial. *Id.* at 782. Cousin was released from prison and later exonerated.

In other cases, Orleans Parish prosecutors have withheld information that went directly to a key witness' credibility, such as a witness' criminal record or plea arrangement. See *State v. Bright*, 875 So. 2d 37, 42-44 (La. 2004) (holding that the state's failure to disclose the prior criminal record of its star witness violated *Brady* and warranted remand for a new trial); *State v. Carney*, 334 So. 2d 415, 417-19 (La. 1976) (holding that the State's failure to disclose its arrangement with a chief witness to drop battery charges against the witness resulted in a *Brady* violation); *State v. Thompson*, 825 So. 2d 552, 555-57 (La. Ct. App. 2002) (holding that the state improperly withheld evidence that witnesses had been promised reward money for testimony implicating the defendant in the crime).

B. *The Orleans Parish District Attorney's Office Has Withheld Evidence of Prior Statements of Other Witnesses that Contradicts Key Witnesses' Testimony*

In still other cases, Orleans Parish prosecutors have withheld favorable statements by

other potential witnesses in police records which would have contradicted the testimony of prosecution witnesses at trial. See *State v. Knapper*, 579 So. 2d 956, 959-61 (La. 1991) (holding that undisclosed witness statements in a detective's report that contradicted witness testimony would have created reasonable doubt as to guilt and therefore established a *Brady* violation); *State v. Rosiere*, 488 So. 2d 965, 970-71 (La. 1986) (holding that nondisclosure of eyewitness statements constituted a *Brady* violation where they corroborated the defendant's testimony and impeached the testimony of a key witness for the State); *State v. Perkins*, 423 So. 2d 1103, 1108 (La. 1982) (holding that the failure to produce an eyewitness statement which substantially corroborated the defendant's version of events was reversible error under *Brady*); *State v. Oliver*, 682 So. 2d 301, 310-12 (La. Ct. App. 1996) (holding that withholding three police reports containing witness statements inconsistent with trial testimony violated the defendant's due process right to a fair trial).

Collectively, these cases show that, in situations in which a conviction turns on the credibility or reliability of a single or few eyewitnesses, the Orleans Parish District Attorney's Office, has frequently withheld from the defense information that would contradict or impeach the testimony of those witnesses. This conduct undermines confidence in the verdicts obtained in these cases.

CONCLUSION

For the foregoing reasons, and those presented by petitioner, the judgment of the trial court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review

Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

AMICUS CURIAE BRIEF

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JUAN SMITH,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ of Certiorari to the Orleans Parish Criminal District Court of Louisiana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 11,000 attorneys and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in criminal practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring the fairness of criminal proceedings. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in cases concerning criminal law and procedure, including *Connick v. Thompson*, 131 S. Ct. 1350 (2011), and *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009).

Criminal trials are, of course, a truth-seeking exercise. The integrity of that process is entirely dependent on prosecutors' compliance with the fundamental constitutional obligation to disclose

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[1] Petitioner has consented to the filing of this brief in a letter on file with the Clerk. Respondent has consented in a letter filed herewith. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Prosecutors' failure to meet their *Brady* obligations inhibits our members' ability to provide meaningful, effective representation to their clients. That increases the likelihood that innocent men and women will be convicted and, as in this case, face the death penalty. NACDL therefore has a strong interest in ensuring *Brady*'s vitality.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rarely will this Court find such comprehensive, clear-cut, and egregious violations of the rule of *Brady v. Maryland*. Petitioner's conviction hinges on a single eyewitness's testimony with no physical evidence to connect him to the crime. It is unconscionable that the prosecution suppressed a clutch of evidence tending to impeach that testimony and refute the eyewitness's identification of petitioner. The simultaneous suppression of other exculpatory evidence—the confession of an alternative suspect and statements exonerating petitioner—undermines confidence in the verdict and also in the investigation itself. Numerous decisions of this Court and the courts of appeals confirm that petitioner is entitled to a new trial—a fair and reliable one that lives up to our Nation's most basic constitutional guarantees.

I. The principles of *Brady* are well settled. The Fifth and Fourteenth Amendments bar prosecutors from suppressing favorable evidence "material either to guilt or to punishment, irrespective of the good

faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Failure to reverse petitioner's conviction would upend decades of precedent from this Court and the courts of appeals granting new trials or habeas relief on facts similar to these. It is virtually a bright-line rule that, where the prosecution's case turns on a critical eyewitness, failure to disclose impeachment evidence demands reversal. Because eyewitness identifications are powerful evidence, casting doubt on such testimony may determine guilt or innocence. For that reason, the courts of appeals consistently hold that suppression of impeachment evidence related to an eyewitness or key witness violates *Brady*.

Evidence suggesting an alternate perpetrator is also classic *Brady* material. A *confession* by an alternative suspect is especially compelling because "'no other statement is so much against interest as a confession of murder.'" *Scott v. Mullin*, 303 F.3d 1222, 1231 n.5 (10th Cir. 2002) (quoting *Donnelly v. United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting)). Such evidence may direct the jury's searching gaze away from the defendant or call into question the reliability of the investigation that resulted in the defendant's arrest. Thus, when such evidence has been suppressed, the courts of appeals order new trials even though other evidence may stand unimpeached.

For similar reasons, the courts of appeals have faulted prosecutors for withholding statements by other perpetrators of the crime that exonerate the

defendant. Such statements are highly material and, if withheld, warrant a new trial.

Suppression of evidence in any *one* of these categories takes on even greater significance when the remainder of the case is weak or circumstantial. The cumulative nondisclosures of *all* of those types of evidence here—in the absence of *any* physical evidence—leave no doubt that the prosecution flagrantly violated *Brady*.

II. Because *Brady* violations are hard to catch, and this Court made clear last term that the Orleans Parish district attorney's office ("Orleans Parish") cannot be held liable for failing to train its prosecutors in *Brady* compliance, it is essential to grant the more traditional and targeted form of relief—a new trial—when violations do surface. Otherwise, *Brady* may reflect more aspiration than reality, especially in jurisdictions, like this one, with well-known reputations for disregarding their *Brady* obligations.

ARGUMENT

I. THE *BRADY* VIOLATIONS IN THIS CASE WERE EGREGIOUS.

A. *Brady* Requires Disclosure Of Materially Favorable Evidence.

The legal principles underlying *Brady* claims are well settled. Due process of law, guaranteed to defendants under the Fifth and Fourteenth Amendments, bars prosecutors from suppressing favorable evidence "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

Favorable evidence includes both impeachment evidence and exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Materially favorable evidence must be disclosed, and the touchstone for materiality is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Accordingly, materiality "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 96 (1976). Similarly, courts must review suppressed evidence "collectively" rather than discount it "item by item." *Kyles*, 514 U.S. at 436. Only when the evidence, viewed as a whole—including the undisclosed evidence—is so overwhelming that guilt is undeniable can a court remain confident that the verdict would have been the same if the evidence had been disclosed. *See id.* at 450 (finding violation because "the physical evidence remaining unscathed would, . . ., hardly have amounted to overwhelming proof").

The point of the rule is to do justice. Fundamental fairness imposes a duty on prosecutors to disclose *Brady* material even when the defendant does not request it. *See Agurs*, 427 U.S. at 107. For similar reasons, prosecutors have a duty to discover and disclose favorable evidence known to police. *See Kyles*, 514 U.S. at 438. Those prosecutors' offices that impose on themselves the burden of deciding what to disclose and what to withhold—some offices simply follow "open file" disclosure rules—must make those determinations in light of the

corresponding burden to uphold the public trust, a trust that was badly broken here. *See id.* at 437.

B. This Case Involves Numerous Nondisclosures That This And Other Courts Have Recognized To Be Textbook *Brady* Violations.

Some *Brady* cases raise close questions. This is not one of them. Petitioner's brief details the flood of evidence, both impeachment and exculpatory, suppressed by the prosecution. *See* Pet. Br. 12-25. The suppressed evidence fits within three categories of evidence routinely recognized as *Brady* material under settled precedent. First, there is a host of undisclosed evidence that would have been very useful for impeaching or refuting the testimony of the only eyewitness at trial to identify petitioner, Larry Boatner. Second, the prosecution also suppressed evidence that another person, Robert Trackling, had confessed to the crime. Third, the prosecution failed to disclose police-recorded statements of Phillip Young—apparently among the perpetrators—essentially denying petitioner's involvement in the crime.

1. Prosecutors must disclose evidence tending to impeach important eyewitness testimony.

a. *This Court has emphasized the importance of disclosing impeachment evidence.*

This Court has recognized that suppression of evidence tending to impeach a key witness is a cardinal *Brady* violation. *See Giglio v. United*

States, 405 U.S. 150, 154 (1972). In *Giglio*, the prosecution did not disclose that it had promised "the only witness linking petitioner with the crime" that "he would not be prosecuted if he cooperated with the Government." *Id.* at 151, 153. This Court held that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Id.* at 154. The witness's immunity was indisputably "relevant to his credibility and the jury was entitled to know of it." *Id.* at 154-55. This Court reversed the conviction because "the Government's case depende[d] almost entirely on [the witness's] testimony[.]" *Id.* at 154; *see also Banks v. Dretke*, 540 U.S. 668, 675, 701 (2004) (concealment of impeachment evidence unconstitutional where the relevant witness's "testimony was the centerpiece of the . . . prosecution's penalty-phase case").

Concealment of impeachment evidence concerning *eyewitnesses* is especially prejudicial because eyewitness identifications are "particularly persuasive" to juries. *Boyette v. Lefevre*, 246 F.3d 76, 92 (2d Cir. 2001). Where identification of the assailant is the key issue, impeaching an eyewitness "would take out the heart of the State's case and greatly undermine the guilty verdicts." *Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir. 1986); *see also Crivens v. Roth*, 172 F.3d 991, 998, 999 (7th Cir. 1999) (impeachment would have "severely damaged" the "heart of the state's case").

Thus, this Court has explained that, "'[i]f, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely

not its perpetrator, and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness.'" *Agurs*, 427 U.S. at 113 n.21 (quoting Victor Bass, Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 125 (1972)). The violation is all the more evident where, as here, only one eyewitness testified at trial.

In *Kyles*, the concealed impeachment evidence aimed at "the heart of the State's case"—two key eyewitnesses. *Kyles*, 514 U.S. at 429; *see also id.* at 441 ("[T]he essence of the State's case was the testimony of eyewitnesses . . . ." (quotation marks and citation omitted)). The prosecution's "best" witness gave an initial identification that did not match the defendant. *Id.* at 441. A second eyewitness testified at trial that he saw the defendant shoot the victim, contrary to his earlier statement that he had not seen the assailant. This Court emphasized that "the evolution over time of a given eyewitness's description can be fatal to its reliability." *Id.* at 444. Habeas relief was required even though significant forensic evidence—including the murder weapon—tied the defendant to the crime. *Id.* at 427-28.

Petitioner's conviction, like the one in *Giglio*, depends on a single witness. No other evidence ties petitioner to the murders. *See* Pet. Br. 41. Boatner's testimony was therefore at least as indispensible to the prosecution's case as the testimony in *Giglio* and *Kyles*. Boatner's testimony also evolved over time—from inability to identify any perpetrator's face to apparent certitude at trial that petitioner committed

the crimes. *See* Pet. Br. 35-36. Unlike *Kyles*, moreover, no second (or third or fourth) eyewitness confirmed Boatner's trial testimony. To the contrary, two undisclosed eyewitness statements confirmed Boatner's initial, also undisclosed, statements that it was *not* possible to identify the perpetrators.

b. ***The courts of appeals have repeatedly ordered new trials in similar circumstances.***

This Court's decisions in cases such as *Giglio* and *Kyles* do not stand alone. The courts of appeals have repeatedly vacated convictions where, as here, suppressed evidence tends to impeach an eyewitness or other important witness. Although *Brady* questions are often fact-intensive, the court of appeals precedent yields what amounts to a bright-line rule: that where the prosecution's case turns on a critical eyewitness, the failure to disclose evidence impeaching that witness's credibility or casting doubt on his recollection demands reversal. Failure to reverse petitioner's conviction would upend decades of precedent on this point.

1. The courts of appeals have recognized that the easiest cases are those, like this one, in which the prosecution puts forward a single eyewitness. Because the undiluted testimony of a single eyewitness carries exaggerated weight, impeachment of such testimony would be self-evidently "crucial to the outcome of the case and the determination of . . . guilt or innocence . . . ." *Robinson v. Mills*, 592 F.3d 730, 736 (6th Cir. 2010).

Impeachment of an eyewitness undermines confidence in a conviction or sentence even where a second eyewitness's testimony may remain undisturbed. *See Lindsey v. King*, 769 F.2d 1034, 1042 (1985) (noting that "positive identification by two unshaken witnesses possesses many times the power of such an identification by one only"); *see also Agurs*, 427 U.S. at 113 n.21. When there is only one eyewitness, therefore, the duty to disclose is especially clear. "[A] defendant suffers prejudice from the withholding of favorable impeachment evidence when the prosecution's case hinges on the testimony of one witness." *Harris v. Lafler*, 553 F.3d 1028, 1034 (6th Cir. 2009) (Sutton, J.). The prosecution "has a duty to disclose evidence in its possession which contradicts the testimony of the only eyewitness to the alleged crime." *Clay v. Black*, 479 F.2d 319, 320 (6th Cir. 1973); *see also D'Ambrosio v. Bagley*, 527 F.3d 489, 498 (6th Cir. 2008); *Horton v. Mayle*, 408 F.3d 570, 581 (9th Cir. 2005).

2. The undisclosed material in this case is particularly compelling because it includes Boatner's own previous inconsistent statements. "Impeachment with a prior inconsistent statement relating to the central issue that the jury was required to decide is a far more serious blow to the prosecution's case than simply pointing out the common situation that . . . testimony resulted from a plea bargain." *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 561 (4th Cir. 1999). Shifting statements open the door to a number of effective counter-attacks—*e.g.*, that a witness is lying or that a witness "did not see [the] attacker well enough to

identify him . . . ." *Boyette*, 246 F.3d at 92; *see also Jacobs v. Singletary*, 952 F.2d 1282, 1289 (11th Cir. 1992). As this Court emphasized, an eyewitness's changing story is therefore undoubtedly material and perhaps "fatal" to his credibility. *Kyles*, 514 U.S. at 444. Indeed, it is "classic *Brady* material." *Boyette*, 246 F.3d at 91.

Thus, a victim's inability to identify the assailant at the time of the offense is crucial impeachment evidence when, at trial, the victim reverses course and makes a positive identification. *See Jamison v. Collins*, 291 F.3d 380, 391 (6th Cir. 2002); *McDowell v. Dixon*, 858 F.2d 945, 949 (4th Cir. 1988). For example, the Fifth Circuit reversed the denial of habeas where a murder conviction rested largely on the basis "of the identification testimony" of two witnesses and the prosecution concealed one witness's prior statement "that he did not see the perpetrator's face . . . ." *Lindsey*, 769 F.2d at 1042. Likewise, the Second Circuit reversed the denial of habeas in a case in which the prosecution suppressed interview notes stating that the victim—and only eyewitness—had initially been unsure of her identification; that her description did not match the defendant; and that she had been unable to identify the defendant from photos. *See Boyette*, 246 F.3d at 91. Similarly, in a Third Circuit case, the prosecution failed to disclose that "perhaps the only credible eyewitness who testified to seeing [the defendant] near the scene of the crime" had previously told police that the perpetrator was *not* the defendant. *Slutzker v. Johnson*, 393 F.3d 373, 387 (3d Cir. 2004).

The Fourth Circuit made the same point in *Spicer*. In that case, the prosecution suppressed the statement of an eyewitness that specifically denied seeing the defendant on the day of the crime. *See* 194 F.3d at 551. The witness testified at trial, however, that he had seen the defendant running from the scene of the crime. *See id.* at 552. Writing for the court, Judge Niemeyer affirmed the district court's grant of habeas because, if the defendant had possessed the conflicting statement, it could have impeached the witness and crippled the prosecution's case. *Id.* at 560-61.

The same is true here. The State's case rested solely on the testimony of Boatner, whose initial statement, as well as statements almost a week later, emphatically denied any ability to describe the assailants. *See* Pet. Br. 13-16. The prosecution had "a duty to disclose [that] evidence" because it directly contradicted his equally emphatic trial testimony identifying petitioner. *Clay*, 479 F.2d at 320. The defense and the jury were entitled to know about Boatner's about-face, especially on an issue so fundamental as whether an identification was even possible. *See Robinson*, 592 F.3d at 736. And impeachment of his testimony would have left the prosecution "without any conclusive, or perhaps even persuasive, identification evidence." *Spicer*, 194 F.3d at 560-61.

3. Boatner's inconsistent statements, while perhaps the most important impeachment evidence, were far from the only conflicting eyewitness evidence suppressed by the State. Two other eyewitnesses stated that the assailants wore masks and could not be identified. Those concealed

statements were consistent with Boatner's initial statements and contradicted his identification of petitioner at trial. *See* Pet. Br. 36-37.

Failing to disclose such evidence is highly relevant. As discussed above, *impeachment* of eyewitness testimony may swing the outcome of a trial because such testimony is particularly persuasive. *See* p. 7, *supra*. *Suppression* of eyewitness testimony is no less damaging to confidence in a conviction. *See, e.g.*, *Goudy v. Basinger*, 604 F.3d 394, 399, 401 (7th Cir. 2010); *Jamison*, 291 F.3d at 389; *McDowell*, 858 F.2d at 950.

Accordingly, prosecutors may not suppress statements of eyewitnesses that contradict the testimony of other witnesses offered at trial. Such evidence could "demonstrate[] that witnesses misidentified" a defendant. *Goudy*, 604 F.3d at 399. In a Sixth Circuit case, as here, prosecutors failed to disclose that a victim's description of his assailant did not match the defendant. *See Castleberry v. Brigano*, 349 F.3d 286, 290 (6th Cir. 2003). The victim in that case—like Shelita Russell here, Pet. Br. 16—died prior to trial, leaving the jury with only the testimony of other witnesses who placed the defendant at the scene. *See Castleberry*, 349 F.3d at 288. The court of appeals reversed the denial of habeas relief because the "description of the assailant would have been highly relevant evidence for the jury to consider had it not been withheld by the government." *Id.* at 293. The fact that the prosecution suppressed *two* contrary eyewitness statements here makes this case even more worthy of reversal.

4. More generally, the courts of appeals find *Brady* violations where evidence undermines a key or crucial witness—even if not an eyewitness. Where "the foundation of the government's entire case rests upon the testimony of one key witness, . . ., the reliability of that witness clearly is determinative of the defendant's guilt or innocence." *United States v. Serv. Deli Inc.*, 151 F.3d 938, 943 (9th Cir. 1998). It is therefore incumbent on the prosecution to disclose a witness's previous statements that conflict with his later trial testimony. *See id.* at 943-44. Simply put, "the government's failure to disclose evidence tending to impeach a crucial witness undermines . . . confidence in the jury's result." *United States v. Campos*, 20 F.3d 1171 (5th Cir. 1994) (Garza, J.) (unpublished table decision) (citing *Giglio*, 405 U.S. at 154-55).

Cases to that effect are legion. *See, e.g., United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) (witness was "the linchpin of the prosecution's case"); *Monroe v. Angelone*, 323 F.3d 286, 300, 316-17 (4th Cir. 2003) (affirming grant of habeas due to failure "to disclose five separate items of impeachment material on [prosecution's] key witness"); *Monroe v. Blackburn*, 607 F.2d 148, 152 (5th Cir. 1979) (reversing denial of habeas where "prosecution's first witness . . . provided the most damaging testimony against" the defendant and there was an "absence of other evidence connecting [the defendant] with the robbery"); *United States v. Boyd*, 55 F.3d 239, 245 (7th Cir. 1995) (Posner, J.) ("Although the testimony of the six prisoner witnesses for the prosecution was corroborated, had their testimony been disbelieved the defendants would have had to be acquitted on

most counts."); *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989) (reversing denial of habeas where "the state's case against petitioner depended almost entirely on [one witness's] testimony"); *United States v. Robinson*, 583 F.3d 1265, 1271 (10th Cir. 2009) (reversing conviction because of suppression of mental health records from confidential informant where "his testimony was central—indeed essential—to the government's case"); *see also Jamison*, 291 F.3d at 389 ("central witness of the trial"); *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 829 (10th Cir. 1995) ("critical state's witness").

If a new trial was necessary in these cases, it necessarily follows that one is required here. Boatner's "credibility was not just a major issue; it essentially was the only issue that mattered." *Serv. Deli*, 151 F.3d at 944.

2. **The prosecution's suppression of a confession by another person violates *Brady*.**

The undisclosed evidence impeaching Boatner's testimony alone warrants reversal. But there is more. The prosecution had evidence that Robert Trackling had confessed to the North Roman murders, yet it failed to disclose that statement prior to petitioner's trial. *See* Pet. Br. 19-21. In *Brady* itself, the Court concluded that suppression of another person's confession was undoubtedly material. *See Brady*, 373 U.S. at 86; *see also Kyles*, 514 U.S. at 445-49 (suppressed inconsistent statements by police informant suggesting informant sought to frame defendant and had committed crime

himself). There is no reason for a different conclusion here.

The courts of appeals agree: "[N]ew evidence suggesting an alternate perpetrator is 'classic *Brady* material.'" *Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010); *accord Boyette*, 246 F.3d at 91; *see also, e.g.*, *Mendez v. Artuz*, 303 F.3d 411, 412-13 (2d Cir. 2002); *DiLosa v. Cain*, 279 F.3d 259, 263, 265 (5th Cir. 2002); *Castleberry*, 349 F.3d at 293; *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995). Evidence of a *confession* by an alternative suspect is inestimably more compelling because "no other statement is so much against interest as a confession of murder." *Donnelly*, 228 U.S. at 278 (Holmes, J., dissenting); *accord Scott*, 303 F.3d at 1232.

The reason is obvious: Evidence that someone else committed the crime reduces the likelihood that the defendant did so. Respondent may assert that Trackling and petitioner might have both committed the crime. But at most, that is an argument for a jury to consider and weigh; not one for the prosecution to pre-judge itself. Indeed, evidence of another's confession is so clearly material that suppression violates the rule of *Brady* even if it only partially exonerates the defendant. *See Williams*, 623 F.3d at 1265. Thus, a new trial on such grounds is necessary even when other evidence, such as eyewitness identifications, remains unaffected by the presence of alternative suspects. *See Trammell v. McKune*, 485 F.3d 546, 552 (10th Cir. 2007) (McConnell, J.).

Evidence of alternative suspects may also allow the defense to attack "the reliability of the

investigation" if it shows that investigators were less than energetic in exploring other potential suspects. *Kyles*, 514 U.S. at 446. After all, a "common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant . . . ." *Id.* (quoting *Bowen*, 799 F.2d at 613). Accordingly, writing for the Tenth Circuit, Judge McConnell reasoned that suppressed evidence of alternative suspects "could also have been used to cast doubt on police officers' decision to focus their attention . . . on [the defendant] rather than" the other suspects. *Trammell*, 485 F.3d at 551.

In light of these principles, "[t]his is not a close case." *Banks*, 54 F.3d at 1517. Trackling's confession was plainly material. And the circumstances surrounding that confession cast a cloud over the entire investigation. Police learned of Trackling's confession from another inmate, but rather than pursue Trackling for the crimes, the government urged the inmate to implicate *petitioner*. *See* Pet. Br. 51-52. Armed with that information, petitioner's counsel could have argued that this is a case of not just simple police neglect in declining to pursue Trackling but an outright frame-up.

3. The prosecution should have disclosed exculpatory statements made by witnesses to the police.

If that was not bad enough, the prosecution also concealed a statement by an apparent perpetrator indicating that petitioner was not involved in the crime. A statement by an apparent perpetrator that directly exculpates a defendant is highly material. *See, e.g.*, *Graves v. Dretke*, 442 F.3d 334, 344-45 (5th

Cir. 2006); *Jacobs*, 952 F.2d at 1288-89. In *Jacobs*, for example, the key issue was which of three perpetrators shot two Florida state troopers. *See* 952 F.2d at 1285. The court of appeals reversed the denial of habeas because the prosecution suppressed evidence that one of the perpetrators denied knowing whether the defendant pulled the trigger, despite testifying with certainty at trial that the defendant had done so. *Id.* at 1288-89.

Similarly, in *Graves*, the prosecution's key witness confessed to the killings and testified against the defendant, pursuant to a plea agreement. *See* 442 F.3d at 337. Prosecutors did not disclose that, after reaching the agreement but before testifying, the witness told police at least three different stories: first, that he committed the murders alone; second, that he conspired with his wife and the defendant; and finally, that he committed the murders with just the defendant. *See id.* The Fifth Circuit found the undisclosed statements key because one placed yet another suspect—the witness's wife—at the scene and another exonerated defendant altogether. The court found the statements "particularly important" because the "conviction rest[ed] almost entirely on [the witness's] testimony" with a complete absence of any other "direct evidence." *Id.* at 344-45.

In this case, police interviewed Phillip Young, apparently one of the perpetrators. When asked whether "Short Dog"—which police believed to be petitioner—was present at the murders, Young indicated he was not. *See* Pet. Br. 17-18. Particularly in conjunction with the evidence undermining Boatner's identification of petitioner,

Young's statements exonerating petitioner would have been crucial to the jury's deliberations.

C. Cumulative Nondisclosures Require A New Trial When Little Physical Evidence Connects A Defendant To The Crime.

The prosecution's cumulative *Brady* violations are all the more inexcusable because, apart from Boatner's testimony, nothing connected petitioner to the crime.

Numerous courts of appeals have concluded that circumstantial cases, unsupported by significant physical evidence, are particularly susceptible to reversal for *Brady* violations. *See, e.g.*, *McDowell*, 858 F.2d at 950-51; *DiLosa*, 279 F.3d at 265; *Harris*, 553 F.3d at 1033; *Castleberry*, 349 F.3d at 289; *Williams*, 623 F.3d at 1266; *Gantt v. Roe*, 389 F.3d 908, 909-10, 913 (9th Cir. 2004) (Kozinski, J.); *Banks*, 54 F.3d at 1521; *Jacobs*, 952 F.2d at 1289. The reason is simple: The concealment of even minimal impeachment or exculpatory evidence may undermine confidence in a relatively weak case.

Accordingly, courts routinely grant a new trial where the prosecution suppressed impeachment evidence and the relevant witness's testimony provided "the only evidence against" a defendant. *Boyette*, 246 F.3d at 80; *see also Killian v. Poole*, 282 F.3d 1204, 1210 (9th Cir. 2002) (directing grant of habeas where witness's testimony provided "core facts" establishing guilt). That is especially true where the witness's testimony is uncorroborated by forensic evidence. *See United States v. Aviles-Colon*, 536 F.3d 1, 21 (1st Cir. 2008); *United States v. Jernigan*, 492 F.3d 1050, 1055 (9th Cir. 2007) (en

banc). Thus, the Fourth Circuit affirmed a grant of habeas where "the prosecution presented *no* physical evidence linking [the defendant] to the crime." *Spicer*, 194 F.3d at 560; *accord Harris*, 553 F.3d at 1033.

Because the eyewitness testimony linking the defendant to the crime was the only inculpatory evidence, failure to disclose evidence tending to impeach that testimony was plainly material. *See Spicer*, 194 F.3d at 560; *accord Harris*, 553 F.3d at 1034; *Slutzker*, 393 F.3d at 387.

II. THERE IS NO EXCUSE FOR *BRADY* VIOLATIONS LIKE THESE IN OUR SYSTEM OF JUSTICE.

This case is as important as it is straightforward. The rule of *Brady* is not a mere constitutional flourish. It serves the fundamental aim of our criminal justice system—to convict the guilty and acquit the innocent. "Society wins not only when the guilty are convicted but when criminal trials are fair[.]" *Brady*, 373 U.S. at 87. That means the State's interest "'is not that it shall win a case, but that justice shall be done.'" *Kyles*, 514 U.S. at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). And it is not difficult to comply with *Brady*; when in doubt, a prosecutor should disclose evidence, both to ensure compliance with the law and, more simply, to promote justice.

The Orleans Parish district attorney's office, however, has given the distinct appearance of wishing only to secure convictions. *See* Pet. Br. 31-32 (citing cases). Indeed, even in this Court of last resort, Orleans Parish has become a repeat player on

this issue. *See Kyles*, 514 U.S. 419; *Connick*, 131 S. Ct. 1350. Just last Term, this Court heard argument in a case where an admitted *Brady* violation by Orleans Parish resulted in 18 years of wrongful incarceration. *See Connick*, 131 S. Ct. at 1356-57. The Court held that the egregious constitutional violation did not make Orleans Parish liable for failing to train its prosecutors in *Brady* compliance. *See id.* at 1356. But this Court's decision to eschew that monetary remedy only makes it more important for courts to provide the more traditional and targeted remedy of a new trial.

It is far too easy for *Brady* violations to pass unnoticed—eventually raised in postconviction proceedings or never discovered at all. Thus, awarding new trials when violations are discovered is essential to promote justice in those cases *and all others*, by holding prosecutors to account when infractions surface.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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August 19, 2011

AMICUS CURIAE BRIEF

No. 10-8145

In The Supreme Court of the United States

JUAN SMITH,

Petitioner,

v.

BURL CAIN, Warden,

Respondent.

On Writ Of Certiorari To The Orleans Parish Criminal District Court Of Louisiana

BRIEF OF AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The Constitution of the United States preserves the rights of the individual states to regulate the practice of law within its boundaries. The ABA, however, has promulgated its own ethical standards for prosecutorial discovery that are broader than those required by the Constitution, standards that have not been adopted by all fifty states. The question presented and addressed in this brief is whether this Court, in considering whether petitioner Juan Smith was denied due process by the actions of the police and prosecution agencies in Louisiana, should recognize, as proposed by the American Bar Association, that a prosecutor's pre-trial ethical disclosure obligations are separate from and broader than the *Brady* constitutional standards.

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STATEMENT OF INTEREST

The National District Attorneys Association (NDAA) respectfully submits this brief as amicus curiae on behalf of respondent.[1]

The National District Attorneys Association (NDAA) is a nonprofit corporation and is the oldest and largest professional organization representing criminal prosecutors in the world. Its members come from the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors with responsibility for prosecuting criminal violations in every state and territory of the United States. Since its founding in 1950, NDAA's programs of education and training, publications, and amicus curiae activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People."

NDAA is dedicated to promoting justice by enhanced prosecutorial excellence. NDAA advocates the highest professional standards by prosecutors, including but not limited to, education and training,

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amicus, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, amicus states that counsel of record for all parties have consented in writing to the filing of this brief.

effective advocacy, integrity, and compliance with constitutional and other legal mandates.

NDAA has a significant interest in this case, particularly with respect to the issue raised by the American Bar Association as amicus curiae in this proceeding in support of petitioner. The ABA amicus brief expressly declines to address the merits of petitioner's claims in this case, but instead asks this Court to recognize prosecutor ethical standards for disclosure of evidence greater than those established by this Court under *Brady v. Maryland*, 373 U.S. 83 (1965), and its progeny. The ABA specifically points to its Model Rule 3.8(d), which sets a standard for disclosure of evidence by prosecutors that is broader than the *Brady* line of cases requires. NDAA, on behalf of all prosecutors, has an interest in any ruling by this Court that would apply to the Orleans Parish District Attorney's Office a standard different from that which is enunciated under *Brady*.

NDAA, and its members, have a compelling interest in the court's determination of this issue because state regulation of the practice of law and prosecutorial ethics are matters of critical importance to this country's prosecutors. Local prosecutors are responsible for the overwhelming number of criminal cases in this country and the standards enunciated by the Court have an enormous impact on their practice. It is ultimately the members of NDAA who will bear the [impossible] burden created by the American Bar Association should this court accept its invitation to "recognize that a prosecutor's pre-trial ethical disclosure obligations, [which are established by the

attorney regulatory body of the highest court of the prosecutor's state or jurisdiction,] are separate from and broader than the Brady constitutional standards." (See amicus curiae brief for the American Bar Association in this proceeding (hereafter "ABA Amicux Brief").)

SUMMARY OF ARGUMENT

This case presents the issue of whether the failure by law enforcement and prosecution officials in Louisiana to disclose certain evidence deprived petitioner of due process and a fair trial. Amicus curiae National District Attorneys Association presents this brief not to analyze the details of the underlying factual and evidentiary points, which have been addressed by respondent. Amicus presents this brief specifically to address the proposal, put forth in the amicus brief filed by the American Bar Association in support of petitioner, that this Court should go beyond the constitutional obligations for prosecutors already recognized, and adopt some sort of supplemental standard under guise of the ABA's proposed model ethical rules, that would serve to regulate the conduct of the Orleans Parish District Attorney's Office in this case, and thereby bind prosecutors throughout the country. The regulation of attorneys, and the rules of professional conduct governing them, is a matter that is appropriately left to the individual states. The ABA, a private organization which does not speak for prosecutors, has suggested that this

Court recognize a rule of conduct for prosecutors, for which it puts forth the ABA's own Model Rule 3.8(d). That rule has not been universally adopted by the states, and fails to fully take into account factors affecting disclosure of information by law enforcement and prosecutors, such as the integrity of ongoing investigations and the safety of witnesses. In addition, the ABA's proposed standard would interpose disclosure obligations for prosecutors that are contrary to the precedents of this Court, and would contradict the discovery obligations and procedures inherent in statutory criminal discovery rules.

ARGUMENT

I. THE AMERICAN BAR ASSOCIATION DOES NOT REPRESENT THE VOICE OF PROSECUTORS

The American Bar Association is the nation's largest attorney organization and among the oldest. It is a private organization. The people of the United States have no voice in the election of its officers or in the determination of its policies. While at times it has been given deference as the voice of America's lawyers, or has been cited as such, the ABA has its own interests and its own agenda.

The ABA consistently supports the defendant against the prosecution whenever it appears in this Court in a criminal case. Nearly twenty years ago an

ABA committee warned of the danger of such persistent partisanship:

> The American Bar Association historically has been an umbrella organization, representing a wide variety of viewpoints from all aspects of the legal profession. Its ethical rules, criminal justice standards, and other contributions to American law have traditionally represented the consensus product of the most experienced and responsible members of the profession. The ABA's unique status, however, is in grave danger, at least as to criminal justice issues. Prosecutors have been increasingly alienated from the ABA, and many are publicly rejecting not merely the ABA's policies but the very legitimacy of the organization's role in promulgating those policies. Reduced to its simplest terms, most prosecutors now perceive that the ABA has become captive to the narrow adversarial interests of the criminal defense bar.

(American Bar Association Advisory Committee on the Prosecution Function, Prosecutors and the ABA (1992))

The ABA has even been criticized as having become a left-wing lobbying group that has "adopted policy positions that are blatantly partisan, outside its area of expertise, or both, triggering a massive loss of membership." (See Christopher Cox, "Anti-Death Penalty Stance Only Latest Evidence; How the ABA became a Left-Wing Lobbying Group" House Policy Committee, *Policy Perspective*, http://www.pro

deathpenalty.com/ABA.htm (webpage last accessed 9/27/11).) As pointed out by Mr. Cox, the ABA has voted to place a moratorium on the execution of violent criminals; endorse funding for the National Endowment of the Arts; endorse single-payer health care plans; oppose regulatory reform; oppose medical malpractice reform; oppose product liability reform; oppose securities litigation reform; and oppose mandatory minimum sentences for drug and firearm offenses. As amicus curiae, the ABA has urged this court to accept its position on the advisement of immigration consequences, unanimous verdicts, pretrial release standards, relief from procedural requirements for prisoners filing federal lawsuits, federal funding for representation of indigent defendants, and habeas procedures. Whatever may be the merits of the various positions taken, it is fair to observe that they fall beyond the stated ABA goals of promoting the professional growth of attorneys, improving the legal profession, eliminating bias, enhancing diversity, and advancing the rule of law.

Recently, in *Bobby v. Van Hook*, 558 U.S. ___, 130 S.Ct. 13 (2009), Justice Alito stated in his concurring opinion:

> I join the Court's per curiam opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special

> relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

(*Bobby v. Van Hook*, supra 130 S.Ct. at 16-17 (Alito, J., concurring.)

In the present case, once again, the ABA attempts, in effect, to persuade this Court to grant their standards constitutional significance by asking the Court to recognize that prosecutorial ethics require broader pre-trial disclosure obligations than those required to ensure due process to the defendant and to judge the conduct of the Orleans Parish District Attorney's Office on the basis of those standards, putting forth the ABA Model Rule 3.8(d).

II. REGULATION OF ATTORNEYS' CONDUCT IS RESERVED TO THE STATES

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, the States have the power to regulate the practice of law. Unless those regulations infringe upon the constitutional rights of others, or create other federal issues, this Court should not intervene.

This Court has already established the constitutional minimums related to the prosecutor's pre-trial disclosure obligations in *Brady* and subsequent cases, as acknowledged by the American Bar Association in its amicus curiae brief in this case (hereafter "ABA Brief"). As this Court stated with respect to the effective assistance of counsel, ABA standards do not determine the constitutional minimum. (See *Jones v. Barnes*, 463 U.S. 745, 753, n. 6 (1983).) Thus, this Court should refrain from entering the sovereign domain of the states with respect to the ethical obligations of their lawyers and allow the states to regulate their attorneys' conduct as they see fit.

III. ABA MODEL RULE 3.8(D) HAS NOT BEEN UNANIMOUSLY ADOPTED BY THE STATES

ABA Model Rule 3.8(d) requires a prosecutor to

> "make timely disclosure to the defense of all evidence or information known to the

> prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

This rule leaves the requirement that disclosure be "timely" open to interpretation and creates a vague standard for prosecutors attempting to navigate ethically through their criminal prosecutions. The rule also broadens the disclosure requirement beyond that required by the Constitution to include favorable information whether or not material to the outcome of the case.

The ABA makes no secret of the fact that Model Rule 3.8(d) is meant to establish a broader ethical obligation for prosecutors than this Court has enunciated under the *Brady* line of cases. The ABA Amicus Brief here includes ABA Formal Opinion 09-454, issued July 8, 2009, which interprets Model Rule 3.8(d) and expressly states that it is inaccurate to conclude that rule simply codifies *Brady*. The ABA opinion goes on to describe several hypothetical scenarios where a prosecutor could fully comply with the constitutional obligations this Court has outlined under *Brady*, but still be in violation of the standard of Model Rule 3.8(d). See ABA Amicus Brief, pages 3a-21a. Of particular note is the ABA conclusion that a prosecutor in the plea bargain setting who fully complied with

the rule this Court set forth in *United States v. Ruiz*, 536 U.S. 622 (2002) (a unanimous result from this Court, with eight justices joining the opinion of the Court, and one justice concurring in the result) would nonetheless be in violation of Model Rule 3.8(d).

The ABA, with a membership of 408,000, suggests that it is the voice of the legal community. But ABA's view in Model Rule 3.8(d) as to what standards prosecutors should follow, going beyond what the law requires, has not been uniformly accepted as the ethical standard.

The California State Bar, with a membership of over 200,000, has not adopted ABA Model Rule 3.8(d). In California, the California Rules of Professional Conduct govern the conduct of the state's attorneys. Rule 5-220 states, "[A] member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce." Thus, with respect to disclosure obligations, a prosecutor's obligation is to disclose evidence and is no broader than to disclose what is required by established law.

The California State Bar recently approved its own Proposed Rule of Professional Conduct 3.8(d). The proposed rule has not yet been adopted by the California Supreme Court and thus is not currently in effect. Even then, California's Proposed Rule 3.8(d), while modeled after the ABA Model Rule, is significantly different insofar as California's version starts with the qualification that prosecutors "*comply with*

all constitutional obligations, as defined by relevant case law, regarding. . . ." (See California Proposed Rule of Professional Conduct 3.8; Special Responsibilities of a Prosecutor. http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=U9iZgIwKhjk%3d&tabid=853.) Thus, even under the Proposed Rule, a California prosecutor's obligation is no broader than the obligation to comply with the Constitution, as defined by relevant case law.

Other states as well have either declined to adopt ABA Model Rule 3.8(d) as written, adopted variations of the rule or limited its application. District of Columbia Rule 3.8(e) for example provides that the prosecutor in a criminal case shall not "[I]ntentionally fail to disclose to the defense, *upon request and at a time when use by the defense is reasonably feasible*, any evidence or information that the prosecutor knows or reasonably should know. . . ." (*Emphasis added.*) Comment 1, accompanying the District of Columbia rule, clarifies that Rule 3.8 is "not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure."

The Ohio Supreme Court declined to construe former Disciplinary Rule 7-103(B), which essentially mirrors its current rule and ABA Model Rule 3.8(d), as requiring a greater scope of disclosure than *Brady* and Ohio statutory law require. The court held that "DR 7-103(B) imposes no requirement on a prosecutor to disclose information that he or she is not required to disclose by applicable law, such as *Brady*

v. Maryland or Crim.R. 16," further stating that "such a rule would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does *not* require disclosure. This would in effect expand the scope of discovery currently required of prosecutors in criminal cases." (*Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415 (2010))

New Jersey Rule 3.8(d) requires timely disclosure to the defense of all "evidence," but does not include the term "information" which is part of the ABA Model Rule. (See *"The Regulation of Lawyers: Statutes and Standards"* (2010 Ed.) Steven Gillers, Roy D. Simon and Andrew M. Perlman.) This standard (as ABA opinion 09-454 makes clear) is not as broad as the ABA model rule.

IV. DISCLOSURE OF "ALL INFORMATION" MAY UNNECESSARILY JEOPARDIZE SAFETY OF WITNESSES, INTEGRITY OF INVESTIGATIONS AND PRIVILEGED INFORMATION

Prosecutors often have other important responsibilities that must be taken into consideration when determining what information must be disclosed to the defense during a criminal prosecution. Often, these considerations must be balanced against the due process rights of the defendant. Where the information in possession of the prosecutor is immaterial to the outcome of the case and therefore does not

implicate the due process rights of the defendant, these other considerations may very well weigh in favor of withholding the information. Prosecutors should have the flexibility to do so without the fear of losing their licenses. Such considerations include the safety of witnesses, the integrity of ongoing-investigations, and privileges associated with the information.

ABA Model Rule 3.8(d) fails to account for these situations, requiring disclosure of not just "evidence," but all favorable "information," whether material or not, at the risk of discipline sanctions, unless a protective order is obtained. States that recognize this and the incredible resources that would be required to get the judiciary involved in reviewing every piece of marginally favorable yet immaterial information known by the prosecution in order for prosecutors to comply with their ethical requirements should have the ability to avoid this through establishing their own disciplinary rules, as is their right.

Although the Arizona Bar adopted ABA Model Rule in its entirety, one committee member in dissenting to Ethics Opinion 94-07: Prosecutor's Duties; Candor, articulated some of the other problems associated with the ABA Model Rule.

> . . . The issue which is of considerable concern to me is the proposal that Ethical Rule 3.8(d) is coextensive with the Constitution. Such an opinion would confer greater rights to defendants than the Constitution does and has the effect of creating a super-exclusionary rule. It would be elevating the opinions of

this committee and the Ethical Rules above decisions of the Supreme Court of Arizona and the Supreme Court of the United States, with the power to create substantive rights for defendants not existing in the Constitution. This is not within the province of this committee; and it may well be a violation of the separation of powers doctrine of the Constitution (*U.S. v. Simpson*, 927 F.2d 1088, 1090-1091 (9th Cir. 1991)); and a violation of the Supremacy Clause of the United States Constitution if applied to federal prosecutors. (*Baylson v. Disciplinary Board of Supreme Court of Pa.*, 975 F.2d 102, 111-113 (3rd Cir. 1992).)

Additionally, the practical realities should be considered. What better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint? This weapon is certainly more effective than the existing exclusionary rule which merely excludes inadmissible evidence. One might expect that such an opinion would be used as a weapon by defense counsel to threaten that the government must now open its entire file despite the fact that the Constitution, as interpreted by the Arizona and United States Supreme Courts, does not require such a result. Prosecutors will be chilled by the thought of defending a bar complaint to the detriment of law enforcement. As the Supreme Court of the United States, in establishing the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), stated in *United States v. Bagley*, 473 U.S. 667 (1985): An interpretation

> of *Brady* to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice. . . .' [Citation omitted.] Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interests in the finality of judgments.
>
> What is more, such open discovery provides the possibility of subornation of perjury, harassment and witness tampering. Many witnesses in criminal investigations involving public and organized crime figures would never cooperate if they knew their information would be prematurely disclosed.
>
> This opinion does violence to well-established constitutional law, and creates adverse consequences to law enforcement. Therefore, I dissent. . . ."

Some state authorities, as well as federal decisional and statutory law also demonstrate the recognition of competing responsibilities of prosecutors.

In *Wallace v. City of Los Angeles*, 12 Cal.App.4th 1385 (1993), though not a case involving discovery, the court recognized the duty of law enforcement to protect the safety of witnesses stating,

> As our society becomes increasingly violent in its daily human interactions, more

and more people are called upon to be witnesses in the prosecution of those causing the violence. Yet, as the number of these potential witnesses grows, so also does the likelihood that they, or their families will be subjected to violence by the very criminal defendants against whom they will give testimony. Thus, the old phrase "violence begets violence" takes on a new meaning. The threat to the safety of these witnesses is very real, especially when the defendant has gang or drug trafficking affiliations. Unfortunately, the lack of safeguards for such witnesses is also very real.

Society reaps enormous benefits when a witness's testimony succeeds in getting a criminal off the streets and placed behind bars. Society must be willing to pay for that benefit by affording necessary protection to both the witness *and* his family, for the threat of violence against a witness's family will often silence the witness. Without a continuing and visible public commitment to such protection, it is unrealistic to expect citizens to come forward and provide the information so critical to the successful operation of the criminal justice system. To the extent that government fails to meet this essential responsibility, it cedes control of our cities to the criminals.

If the result which we reach in the case before us brings about a greater level of official concern and action promotive of witness safety, and an appropriate devotion of public

> resources to that end, the long term result surely will be an increase in both the effectiveness of the criminal justice system and the level of public confidence in it. The attainment of that result is certainly a public policy goal of very high priority.

(*Wallace*, supra, 12 Cal.App.4th at 1405-1406; overruled on other grounds in *Adkins v. State*, 50 Cal.App.4th 1802 (1996))

The concerns cited in *Wallace* apply equally to the disclosure of information that jeopardizes the safety of such individuals. Thus, in the interest of witness protection, a prosecutor should be able to evaluate the materiality of the information in possession of the prosecution, before disclosing that information at the risk of human lives.

Under California Evidence Code section 1042(c), evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the narcotics offense charged, is admissible on the issue of reasonable cause to make an arrest or search *without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied*, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.

The failure of ABA Model Rule 3.8(d) to adequately address these issues is further reason why

this Court should not adopt it as some extra constitutional obligation.

V. ABA MODEL RULE 3.8(D) CREATES OBLIGATIONS THAT RUN CONTRARY TO STATUTORY DISCOVERY SCHEMES

The considerations as to state regulation of prosecution disclosure requirements which may be different from ABA Model Rule 38(d) are all the more pertinent if the state has a comprehensive statutory scheme regulating criminal discovery. Turning again to California as an example, that state has a statutory criminal discovery act which specifies what each party must provide the other as discovery in criminal cases, as well as the timeline for disclosure. See California Penal Code sections 1054 through 1054.10. When a prosecutor does not intend to call a particular witness, the prosecutor need not turn over evidence from that witness, even if exculpatory, until 30 days before trial (absent court order). California Penal Code sections 1054.1, 1054.7.

This is certainly within constitutional requirements. This Court has stated that there is no general federal constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The limited discovery obligation under *Brady* is a fair trial right, not linked to pre-trial proceedings. Id.; *United States v. Agurs*, 427 U.S. 97, 108 (1976); *United States v. Ruiz*, supra, 536 U.S. at 631-632. By contrast, ABA Model Rule 3.8(d), as interpreted in

opinion 09-454, makes it clear that "timely" disclosure for purposes of the rule may be much earlier than the constitutional obligation requires. See opinion 09-454, specifically those sections of the opinion in the ABA amicus brief at pages 17a-18a. Thus, a California prosecutor could comply fully with applicable *Brady* precedent, as well as the California statutory discovery scheme, but still be subject to an ethical violation under the ABA model rule.

Similarly, in federal prosecutions, the defense has no right to a list of prospective witnesses, except in death-penalty cases – and even then only three days before trial and subject to security restrictions of 18 U.S.C. § 3432. Likewise, under the Jencks Act, 18 U.S.C. § 3500, "witness statements" (as statutorily defined) may be withheld and not disclosed until after the direct testimony of the witnesses. The *Brady* problem then must be dealt with via continuances. (*United States v. Cerna*, 2009 U.S. Dist. LEXIS 85281 (N.D. Cal. Sept. 16, 2009); see also, *United States v. Alvarez*, 358 F.3d 1194, 1211 (9th Cir. 2004). According some level of constitutional recognition to ABA Model Rule 3.8(d) would thus put the ethical requirements for federal prosecutors at odds with federal statutory discovery law.

The ABA should not be in the business of dictating to the individual states or the federal government discovery policies and procedures that go beyond those adopted in a comprehensive statutory scheme. Yet under Model Rule 3.8(d), that is precisely what the ABA has done, attempting to accomplish through

the tool of an ethical obligation what was rejected in the legislative process. Through its amicus brief in this matter, the ABA has asked this Court to aid and abet their endeavor.

CONCLUSION

This Court has already established the constitutional obligations related to the prosecutor's pre-trial disclosure obligations in *Brady* and subsequent cases. The ABA standards should not serve as some sort of constitutional supplement to expand those standards. This Court should refrain from opining that Orleans Parish District Attorney's Office is bound by ethical duties broader that those required by the United States Constitution, and continue to allow Louisiana and the other states to regulate their own attorneys' conduct.

Dated: October 3, 2011 Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-8145

AUG 13 2011

IN THE

Supreme Court of the United States

JUAN SMITH,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT OF LOUISIANA

BRIEF FOR THE ORLEANS PUBLIC DEFENDERS OFFICE AS AMICUS CURIAE SUPPORTING PETITIONER

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IN THE

Supreme Court of the United States

No. 10-8145

JUAN SMITH,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT OF LOUISIANA

BRIEF FOR THE ORLEANS PUBLIC DEFENDERS OFFICE AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE[1]

The Orleans Public Defenders Office provides the citizens of Orleans Parish with the highest quality client-centered legal representation in Louisiana's criminal and juvenile justice system. Its vision is to create a community-oriented defender office built upon the

[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

zealous defense of the poor and indigent while acknowledging the strengths of clients, families, and communities. The Orleans Public Defenders Office represents a substantial number of criminal defendants in the city of New Orleans. In 2010 alone, the Orleans Public Defenders Office represented defendants in more than 10,500 of the approximately 13,000 new state felony and misdemeanor cases that were filed in the Orleans Parish Criminal District Court.

This case addresses an issue of great importance to the Orleans Public Defenders Office because it is yet another in a long line of cases in which the Orleans Parish District Attorney's Office has failed to comply with the obligation to disclose exculpatory and impeachment evidence to the defense under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny. The integrity and reliability of any criminal trial depend on the prosecution's compliance with this longstanding constitutional mandate. The well-documented, persistent failure of the Orleans Parish District Attorney's Office to comply with its *Brady* obligations undermines the truth-seeking function of the criminal trial and greatly impedes the ability of the Orleans Public Defenders Office to provide meaningful representation to its clients. It also increases the likelihood that innocent individuals will be wrongfully convicted and sentenced to long terms in prison or even death—which has happened repeatedly in Orleans Parish as a result of prosecutors' suppression of exculpatory or impeachment evidence in circumstances remarkably similar to this one.

Amicus submits that the startling facts of this case are, regrettably, neither unique nor surprising in Orleans Parish. As in many other cases described herein, the instances of nondisclosure here arose from a willingness on the part of the Orleans Parish District At-

torney's Office to flout its obligations under this Court's precedents by leaving undisclosed information that is unquestionably material to the defense. Amicus respectfully urges that the Court reinforce the prosecutorial disclosure obligation by reversing the judgment below.

SUMMARY OF ARGUMENT

This Court has long recognized that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *see Berger* v. *United States*, 295 U.S. 78, 88 (1935). A key safeguard against such unfairness is the well-established principle that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

The prosecution's failure to heed its constitutional obligation to disclose material exculpatory and impeachment evidence in Petitioner Juan Smith's case was not an isolated incident. Over the years, and particularly from 1974-2003 under District Attorney Harry Connick, the Orleans Parish District Attorney's Office has amassed a well-documented record of disregarding this Court's mandate in *Brady* and its progeny. Orleans Parish prosecutors frequently have suppressed key evidence favorable to the accused; repeatedly have responded to pretrial discovery requests by informing defendants that they are "not entitled" to exculpatory or impeachment evidence; and in at least one instance purposefully have hidden evidence that exonerated the defendant. Even after this Court's decision clarifying

the scope of a prosecutor's duty under *Brady* in *Kyles* v. *Whitley*, 514 U.S. 419 (1995)—which itself involved the suppression of *Brady* material by Orleans Parish prosecutors—District Attorney Connick saw no reason to change his office's practice with respect to these issues.

Not surprisingly, the Orleans Parish prosecutors' chronic disregard for their *Brady* obligations has had a material impact on the results of numerous criminal trials, many of which involved the suppression of evidence strongly resembling the evidence that was withheld in this case. Four people on Louisiana's death row were later exonerated through an acquittal or a decision to drop the charges after *Brady* information previously suppressed by Orleans Parish prosecutors came to light. And a number of other defendants—many serving life sentences—have been exonerated in the same manner. In those cases, *Brady* violations committed by the Orleans Parish District Attorney's Office have threatened to undermine the constitutional guarantee that "the criminal trial, as distinct from the prosecutor's private deliberations, [is] the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. This case is another in that unfortunate series, and the Court should accordingly reverse the judgment below.

ARGUMENT

I. THE ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE HAS A NOTORIOUS HISTORY OF FAILING TO COMPLY WITH ITS OBLIGATIONS UNDER *BRADY*

A. The Longstanding, Consistent Failure Of The Orleans Parish District Attorney's Office To Comply With *Brady* Has Persisted Notwithstanding This Court's Admonition In *Kyles*

1. It should come as no surprise that the tenure of Orleans Parish District Attorney Harry Connick has produced another egregious *Brady* violation warranting correction by this Court. During Connick's tenure, the Orleans Parish District Attorney's Office compiled a disturbingly long track record of suppressing favorable, material evidence in violation of *Brady*. According to a study conducted by Innocence Project New Orleans, at least a quarter of death sentences in Orleans Parish imposed on Connick's watch—nine out of thirty-six—were tainted by *Brady* violations.[2] And in at least nineteen documented non-capital cases, courts held that Orleans Parish prosecutors failed to disclose favorable, material evidence.[3]

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[2] *See Innocence Project New Orleans Report*, at 1 ("According to available records, favorable evidence was withheld from 9 of the 36 (25%) men sentenced to death in Orleans Parish from 1973-2002."), *available at* http://www.ip-no.org/sites/default/files/images/Press_Release_Report.pdf (last visited Aug. 18, 2011); *see also, e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 421-422 (1995); *State* v. *Bright*, 875 So. 2d 37, 42-44 (La. 2004); *State* v. *Cousin*, 710 So. 2d 1065, 1066 n.2 (La. 1998); *State* v. *Thompson*, 825 So. 2d 552, 557-558 (La. Ct. App. 2002).

[3] *See Innocence Project New Orleans Report*, at 1 ("An additional 25 non-capital cases were examined in which allegations of

One former assistant district attorney in Connick's office attributed this unsettling record to the office's traditionally aggressive attitude with respect to disclosing potentially helpful evidence to the defense. He explained in an affidavit that the practice "was to be as restrictive as possible with *Brady* information. ... The policy was 'when in doubt, don't give it up.'" Aff. of Bill Campbell ¶ 7, *Truvia* v. *Julien*, No. 04-cv-680, Dkt. No.

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evidence suppression were made. In 19 of these cases, courts found favorable evidence that was indeed withheld, and in all others the court deemed the allegations warranted an evidentiary hearing." (footnote omitted)); *see also, e.g.*, *Mahler* v. *Kaylo*, 537 F.3d 494, 503-504 (5th Cir. 2008); *Robinson* v. *Cain*, 510 F. Supp. 2d 399, 416 (E.D. La. 2007); *Perez* v. *Cain*, 2008 WL 108661, at *15, 28 (E.D. La. Jan. 8, 2008); *State* v. *Knapper*, 579 So. 2d 956, 960-961 (La. 1991); *State* v. *Rosiere*, 488 So. 2d 965, 969-971 (La. 1986); *State* v. *Perkins*, 423 So. 2d 1103, 1107-1108 (La. 1982); *State* v. *Curtis*, 384 So. 2d 396, 398 (La. 1980); *State* v. *Falkins*, 356 So. 2d 415, 417 (La. 1978); *State* v. *Carney*, 334 So. 2d 415, 418-419 (La. 1976); *State* v. *Lindsey*, 844 So. 2d 961, 969-970 (La. Ct. App. 2003); *State* v. *Lee*, 778 So. 2d 656, 667 (La. Ct. App. 2001); *State* v. *Oliver*, 682 So. 2d 301, 310-312 (La. Ct. App. 1996); *State* v. *Smith*, 591 So. 2d 1219, 1225-1228 (La. Ct. App. 1991); J. on Appl. for Post-Conviction Relief 4-7, *State* v. *Bright*, No. 252-514 (Orleans Crim. Dist. Ct. Oct. 1, 2002).

Of course, this figure is likely to be "a gross underestimation of the number of cases in which evidence may have been suppressed" because many *Brady* violations—which by their nature involve hidden or suppressed evidence—never come to light. *See Innocence Project New Orleans Report*, at 1 n.1. This is especially true in non-capital cases, in which inmates "have no right to a lawyer at exactly the point in the appeals process at which they could investigate and prove that favorable evidence was suppressed, or false evidence presented, at their trial." *Id.*

100-8 (E.D. La. May 29, 2007).[4] He also noted that assistant district attorneys often would "deny the *Brady* request as 'not entitled' and effectively pass the buck to the judge if indeed the criminal defendant pursued the information." *Id.* Under Connick, the "office stressed winning cases. ... As a result, many cases were tried notwithstanding the fact that [assistant district attorneys] may have wanted to dismiss certain cases due to serious questions regarding the defendant's guilt." *Id.* ¶ 9.

2. This pattern of withholding *Brady* material has led a number of "Orleans Parish Criminal Court judges [to] voic[e] their dismay." Coyle, *Lawyers Claim DAs Withhold Evidence: Kyles Case Fits Pattern, They Say*, New Orleans Times-Picayune, Sept. 21, 1997, at A1; *see also* Coyle, *Court to DA: Stop Stalling; Office Ordered to Disclose File*, New Orleans Times-Picayune, June 23, 1998, at A1 (Orleans Parish "judges have grown increasingly impatient with what they say are clear violations of discovery laws by prosecutors"). During his tenure on the Orleans Parish Criminal District Court, Judge Calvin Johnson repeatedly sounded the alarm regarding what he perceived as a "'pattern ... not just based on lethargy, but on an active unwillingness to follow the rule of law.'" Coyle, *Court to DA: Stop Stalling*. To encourage compliance with *Brady*, he often "held prosecutors in contempt" or "ordered them to take law classes." Armstrong & Possley, *The Verdict: Dishonor*, Chi. Trib., Jan. 10, 1999, at C1. And he eventually took the unusual step of writing a letter to Con-

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[4] *Truvia* v. *Julien* was one of the many civil suits arising out of wrongful convictions due to *Brady* violations by Orleans Parish prosecutors.

nick "voic[ing] concern over the increase in violations of [*Brady*] by 'some of your assistant district attorneys.'" *In re Jordan*, 913 So. 2d 775, 783 n.14 (La. 2005). According to Judge Johnson, "'[f]rom (Connick's) perspective, bad guys are bad guys and whatever we need to do to put them away is OK[.] But the problem is, every now and then, it's not a bad guy. Every now and then, you've got the wrong guy.'" Armstrong & Possley, *The Verdict: Dishonor*.

A number of other local judges have voiced similar concerns. For example, after the prosecution withheld crucial exculpatory laboratory evidence in the John Thompson case, "Criminal District Judge Patrick Quinlan, seemingly miffed that the misdeeds unfolded in his courtroom[,] ... called for two public hearings on the concealment of evidence." Bell, *Evidence Flap Has DA on Defensive; Connick Insists Case an Aberration*, New Orleans Times-Picayune, May 31, 1999, at A1. In addition, multiple judges have ordered Orleans Parish prosecutors to open their entire files to the defense as a sanction for repeated failures to meet pretrial discovery deadlines. *See* Coyle, *Court to DA: Stop Stalling* (describing such orders from Chief Judge Leon Cannizzarro Jr., Judge Julian Parker, and Judge Johnson).

3. Moreover, Orleans Parish prosecutors' failure to comply with *Brady* has persisted well after this Court's 1995 admonition that "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles* v. *Whitley*, 514 U.S. 419, 438 (1995). *Kyles* itself involved Orleans Parish prosecutors' "blatant and repeated violations of [that] well-settled constitutional obligation" in a capital case, and raised particular concern because it featured "so many instances of the state's failure to disclose exculpatory evidence."

Id. at 455 (Stevens, J., concurring). After examining those instances in detail, this Court rebuked the Orleans Parish District Attorney's Office for "descend[ing] to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth," underscoring that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Id.* at 439.

Nonetheless, when questioned about the *Kyles* case years later, Connick indicated that he "saw no need, occasioned by *Kyles*, to make any changes" in his office's practices with respect to *Brady* compliance, *Connick* v. *Thompson*, 131 S. Ct. 1350, 1382 (2011) (Ginsburg, J., dissenting), because he was "satisfied with what [the] policy was," Trial Tr. 184-185, *Thompson* v. *Connick*, No. 03-cv-2045, Dkt. No. 178 (E.D. La. Feb. 6, 2007) (Connick testimony) (hereinafter "Connick Tr."). Indeed, Connick displayed a seemingly willful ignorance of the lessons to be drawn from *Kyles*:

> Q. What is your recollection of what state versus Curtis Kyles involved?
>
> A. I think what sticks out in my mind most is it wasn't a *Brady* case.
>
> Q. That it was not a *Brady* case?
>
> A. That's my recollection of it. But—but I remember that his claim was denied by the United States Court of Appeals.
>
> ...
>
> Q. Do you ... recall that his claim was found to be valid by the United States Supreme Court?
>
> A. Not really.

Connick Tr. at 183; *see id.* at 176 ("I stopped reading law books ... when I became the DA, and looking at

opinions."). And at least some of Connick's assistants appeared to share his flagrant disregard for this Court's decision: during closing arguments in the *Kyles* retrial on remand, "prosecutor Glen Woods said the nation's highest court was wrong in the famous *Plessy* vs. *Ferguson* case ... and it was wrong on *Kyles*." Coyle, *Lawyers Claim DAs Withhold Evidence*.

Indeed, Orleans Parish prosecutors' record of compliance with *Brady* remained dismal even after *Kyles*, as evidenced by several *Brady* violations that prosecutors committed in trials after April 1995—including in two capital cases. *See, e.g.*, *State* v. *Bright*, 875 So. 2d 37, 42-44 (La. 2004) (capital case); *State* v. *Cousin*, 710 So. 2d 1065, 1066 n.2 (La. 1998) (capital case); *State* v. *Lee*, 778 So. 2d 656, 667 (La. Ct. App. 2001). Local defense attorneys continued to register concern that "Orleans Parish prosecutors still routinely withh[e]ld evidence, especially in high-profile cases." *See* Coyle, *Lawyers Claim DAs Withhold Evidence* ("[I]f the *Kyles* case resonated nationally, the public scolding has had little practical effect closer to home, defense attorneys say."). According to one New Orleans defense attorney, "'[t]his is a pattern and practice, and if anything, it has gotten worse [since *Kyles*]. ... It is worse than anywhere else in the state.'" *Id.*[5]

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[5] Even recently, the Orleans Parish Criminal District Court granted a new trial to Michael Anderson, the first defendant sentenced to death in Orleans Parish since 1997, after finding that the prosecution had suppressed a videotaped statement from the sole eyewitness contradicting her in-court testimony. *See* Filosa, *Death Row Inmate To Get New Trial*, New Orleans Times-Picayune, Mar. 9, 2010, at A5.

B. Prosecutor Roger Jordan Has A Personal Record Of Disregarding *Brady*

In addition, former Orleans Parish Assistant District Attorney Roger Jordan—the lead prosecutor in this case—has his own record of violating *Brady*. Jordan became the first prosecutor to be sanctioned by the Supreme Court of Louisiana for withholding favorable evidence from an accused. *In re Jordan*, 913 So. 2d at 781. Those sanctions arose from his "undisputed failure to turn over an eyewitness's statement to the defense" in the capital trial of Shareef Cousin—a case that Jordan was first assigned in 1995, around the time he was assigned this case. *Id.* at 777, 778.

As discussed in greater detail below, Cousin was convicted of capital murder and sentenced to death largely on the testimony of a single eyewitness who identified Cousin as the perpetrator. In preparing for trial, however, Jordan interviewed that witness and learned that she could not see the perpetrator clearly on the night of the murder because "'it was dark and I did not have my contacts nor glasses.'" *In re Jordan*, 913 So. 2d at 777. "Considering this information, [Jordan] unilaterally determined that the absence of contacts or glasses on the night of the murder did not affect [the witness's] identification," and he therefore did not disclose that statement to the defense. *Id.* at 778. The Supreme Court of Louisiana disagreed, ruling that Jordan "failed to produce evidence which was clearly exculpatory and should have resolved this issue in favor of disclosure." *Id.* at 782. Concluding that Jordan "knowingly withheld *Brady* evidence," the Supreme Court of Louisiana imposed a deferred three-month suspension from the practice of law. *Id.* at 783, 784.

Jordan's actions in the Cousin case were not an isolated incident. In 2006, after Jordan had moved to Jefferson Parish, the Supreme Court of Louisiana affirmed a trial court's grant of a new trial in a murder case there because Jordan's prosecution team "had suppressed material exculpatory evidence" "in two instances." *State* v. *Miller*, 923 So. 2d 625, 626 (La. 2006). The trial court had found that "prosecutors withheld their witnesses' criminal backgrounds from defense attorneys." *See* Purpura, *Courts Adapt to Absence of Key Prosecutor; Colleagues Take Lead in Murder Cases*, New Orleans Times-Picayune, Nov. 24, 2007, at 1.

II. The Withholding Of Material Exculpatory Or Impeachment Evidence By The Orleans Parish District Attorney's Office Has Directly Resulted In Numerous Wrongful Convictions

Under *Brady* and its progeny, the "touchstone of materiality is a 'reasonable probability' of a different result." *Kyles*, 514 U.S. at 434 (quoting *United States* v. *Bagley*, 473 U.S. 667, 678 (1985)). To be sure, in assessing materiality, this Court has recognized "the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecut[ion]." *Bagley*, 473 U.S. at 683. But the track record of the Orleans Parish District Attorney's Office is replete with examples of wrongfully convicted defendants who have been exonerated in light of *Brady* material disclosed after the fact. Such exonerations have resulted from a jury's decision to acquit the accused upon retrial or, more commonly, the prosecution's decision to drop the charges altogether.

In many instances—such as in the examples that follow—*Brady* violations committed by Orleans Parish

prosecutors have done even more than "undermine confidence in the verdict," *Kyles*, 514 U.S. at 435; they have actually changed the result of the trial. Many of the examples of nondisclosure in these cases resemble the instances of nondisclosure asserted by Petitioner here—including suppression of evidence casting doubt on a key witness's trial testimony, police reports or other documents exculpating the accused, information undermining the prosecution's theory of the case, and reports or interview notes implicating a different individual in the crime. Accordingly, amicus submits that the outcomes in these other cases provide strong evidence of the materiality of the disclosure violations in this case and support reversal of the judgment below.

A. Four Death-Row Inmates Have Been Exonerated Upon The Disclosure Of *Brady* Material Withheld By Orleans Parish Prosecutors

Orleans Parish prosecutors' suppression of favorable impeachment or exculpatory evidence has resulted in the wrongful convictions and death sentences of at least four people. The withholding of such evidence proved to be unmistakably material in those cases and bears notable similarities to the situation presented in this case.

1. The Curtis Kyles case exemplifies the difference that the suppression of favorable evidence can make. After his first trial ended in a hung jury, Kyles was convicted and sentenced to death for the 1984 murder of a 60-year-old woman in the parking lot of a New Orleans grocery store. *Kyles*, 514 U.S. at 421, 423. Kyles became a suspect based on a story from an informant who contended, among other things, that he had purchased the victim's car from Kyles shortly after the murder and that the murder weapon and other evi-

dence could be found at Kyles's house. *Id.* at 426-427. At trial, the prosecution presented physical evidence that police, acting on the informant's tip, had found at Kyles's house as well as testimony from four eyewitnesses identifying Kyles as the perpetrator. *Id.* at 430-431.

It later came to light, however, that the Orleans Parish District Attorney's Office had withheld, among other things, statements "reveal[ing] that the State's informant, who was crucial to the State's ability to finger Kyles in the first place, was an incessant liar and schemer who appeared anxious to see ... Kyles arrested for the murder." *Kyles* v. *Whitley*, 5 F.3d 806, 834 (5th Cir. 1993) (King, J., dissenting). Indeed, those statements revealed that the informant "repeatedly expressed concern that he might himself be a suspect in the murder." *Kyles*, 514 U.S. at 425. The prosecution also withheld police reports containing statements from the eyewitnesses describing the perpetrator on the day of the murder, which differed from the testimony they gave at trial and were more consistent with a description of the informant than of Kyles. *Id.* at 441-444. The prosecution did not disclose this evidence—some of which bears remarkable resemblance to the withheld evidence in Petitioner's case, including statements from the eyewitness on the night of the murder that contradicted his identification of Petitioner at trial and evidence implicating a different suspect, *see* Pet. Br. 34-45—even though the defense had filed a pretrial motion requesting that the prosecution disclose any exculpatory or impeachment evidence. Rather, "[i]n its response to that motion, the prosecution based its denial on the claim that there was '[n]o exculpatory evidence,'" *Kyles*, 5 F.3d at 827 (King, J., dissenting), which is the same claim the prosecution made in re-

sponse to Petitioner's pretrial discovery motion in this case, *see* Pet. Br. 4 ("'[n]o exculpatory or favorable evidence is available to the State at the present time'").

After examining this previously undisclosed evidence, the dissenting judge on the United States Court of Appeals for the Fifth Circuit stated that "[f]or the first time in my fourteen years on this court ... I have serious reservations about whether the State has sentenced to death the right man." *Kyles*, 5 F.3d at 820 (King, J., dissenting). This Court agreed that "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable," *Kyles*, 514 U.S. at 441, noting that—in light of the cumulative impact of the undisclosed evidence—"'fairness' cannot be stretched to the point of calling this a fair trial," *id.* at 454; *see also Kyles*, 5 F.3d at 841 (King, J., dissenting) ("Once the effect of all of the *Brady* evidence is considered, what is left of the State's case is tenuous at best.").

It subsequently became apparent that Kyles could not be convicted in a "fair trial" featuring the previously suppressed evidence. After Kyles's conviction was reversed, the prosecution tried Kyles for the same murder three more times; each trial ended in a hung jury. After the fifth trial ended in a mistrial, the district attorney's office decided that it could not obtain a conviction and dropped the charges. *See* Coyle, *Fifth Murder Trial a Mistrial: Connick Says He's Giving up on Kyles Case*, New Orleans Times-Picayune, Feb. 18, 1998, at A1. Kyles was released from prison after having spent eleven years on death row. *See* Coyle, *Jubilant Family Welcomes Kyles*, New Orleans Times-Picayune, Feb. 19, 1998, at A1.

2. Withholding of critical impeachment evidence by the Orleans Parish District Attorney's Office also had a material impact on Dan Bright's 1996 capital conviction and death sentence. Bright was convicted of first-degree murder and sentenced to death for the 1995 slaying of a man outside a Ninth Ward bar on Super Bowl Sunday. As in Petitioner's case, prosecutors lacked any physical evidence connecting Bright to the crime; they therefore relied heavily on the testimony of a sole purported eyewitness who identified Bright as the assailant. *Bright*, 875 So. 2d at 42-43. Although Bright produced two alibi witnesses who testified that Bright was around the corner at the time of the shooting, the prosecution successfully used the witnesses' criminal records to impeach their testimony. *Id.* at 42.

After Bright was sentenced to death, however, information surfaced that prosecutors had suppressed the same type of impeachment information regarding their own star witness—namely, that their witness had an extensive criminal record, that he had been on parole at the time of the incident, and that he was in danger of having his parole revoked because he admittedly had been drinking that day. *Bright*, 875 So. 2d at 42-43. The Supreme Court of Louisiana held that such information "can form an important source for impeachment" and that its "importance ... can be heightened" in cases—such as Petitioner's—where, aside from the witness's identification testimony, there was no evidence linking the defendant to the crime. *Id.* at 43. The court found the prosecution's suppression of such evidence particularly egregious given that "the State utilized the same type of impeachment evidence of prior convictions that was withheld from the defense," and because "[t]he prosecution had responded 'not entitled' to a pre-trial request by the defense for the production

of rap sheets of the State's witnesses." *Id.* Concluding that "there can be no confidence in the verdict" because "those responsible for assuring compliance with the law [did] not follow the rules," the court granted post-conviction relief and vacated Bright's conviction and sentence. *Id.* at 45. The State subsequently declined to retry Bright, and he was released after spending eight years in prison, five of which he spent on death row. *See* Webster, *Hidden Innocence: Wrongful Convictions Ripple through Court System*, New Orleans City Bus., May 28, 2007.[6]

3. Likewise, Shareef Cousin was convicted and sentenced to death in a trial that would have been materially affected by undisclosed, favorable evidence—evidence that, similar to the suppressed statements in Petitioner's case, undermined crucial eyewitness identification testimony. In 1996, seventeen-year-old Cousin became the youngest inmate on Louisiana's death row after he was convicted of the shooting death of a man outside a French Quarter restaurant. *See* Coyle, *Port of Call Case Retrial Ordered: Court Says Teen Treated Wrongly*, New Orleans Times-Picayune, Apr. 15, 1998, at A1. During Cousin's trial, the Orleans Parish District Attorney's Office relied heavily on the testimony of the victim's companion, who was the only eyewitness able positively to identify Cousin as the perpetrator. *See In re Jordan*, 913 So. 2d at 777-778. Similar to the eyewitness in Petitioner's case, she testified at trial

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[6] Bright's death sentence had been set aside in 2000; he was resentenced to life in prison without parole. *See State* v. *Bright*, 776 So. 2d 1134, 1137 (La. 2000) (holding that "the record supports a conviction of the defendant for second degree murder," rather than for the capital crime of first-degree murder).

that she was certain Cousin was the killer, that she would never forgive him, and that she would "never forget" his face. Coyle, *Port of Call Case Retrial Ordered*; *see* Pet. Br. 7 (eyewitness testified "that there was '[n]o doubt' that petitioner was that man; and that he would 'never forget [petitioner's] face'").

The same witness, however, had given police a statement on the night of the murder that she "'did not get a good look at the perpetrators and probably could not identify them.'" *In re Jordan*, 913 So. 2d at 777. Three days later, the witness further explained that "'it was dark and I did not have my contacts nor glasses,'" and that she could make out only "'outlines and shapes.'" *Id.*; *cf.* Pet. Br. 13-14 (immediately after the murder, the eyewitness in Petitioner's case "'could not ... supply a description of the perpetrators other th[a]n they were black males'" and told police he "'was too scared to look at anybody'" (emphasis omitted)). The prosecutor, Roger Jordan, never disclosed the latter statement to the defense because, "in his judgment, [the] statement was not material exculpatory evidence to which the defense would be entitled under *Brady*." *In re Jordan*, 913 So. 2d at 778. Indeed, he objected when the defense sought to discover whether the witness had given any other statements to police. *Id.* at 779. Calling it "obviously exculpatory," the Supreme Court of Louisiana concluded that the statement should have been turned over, "as required by *Brady* v. *Maryland* and *Kyles* v. *Whitley*." *State* v. *Cousin*, 710 So. 2d 1065, 1066-1067 n.2 (La. 1998) (citations omitted). (It was this behavior that led to Jordan's sanction by the Supreme Court of Louisiana. *See supra* Part I.B.)

Although it ultimately reversed Cousin's conviction and sentence on evidentiary grounds without reaching the *Brady* issue, the Supreme Court of Louisiana

stated that the prosecution should have resolved the question "'in favor of disclosure,'" noting that the exculpatory evidence would "be available at the new trial." *Cousin*, 710 So. 2d at 1073 n.8. Once that evidence was available, "the Orleans Parish District Attorney's Office elected not to retry Mr. Cousin" on remand and dropped the charges. *In re Jordan*, 913 So. 2d at 779; *see* Varney, *DA Drops Murder Charge; Inmate on Death Row Was Granted New Trial*, New Orleans Times-Picayune, Jan. 9, 1999, at A1.

4. A *Brady* violation also can have material consequences even beyond the particular case in which it was committed. For example, in 1985, John Thompson was sentenced to death for the 1984 shooting death of a hotel executive. *See* Filosa, *Court Overturns Murder Conviction*, New Orleans Times-Picayune, July 18, 2002, at B1. But in 2003, he was granted a new trial—in which he was ultimately acquitted—on the basis of newly discovered exculpatory evidence that the Orleans Parish District Attorney's Office had suppressed in a separate case. *See* Filosa, *N.O. Man Cleared in '84 Murder*, New Orleans Times-Picayune, May 9, 2003, at A1.

As in Petitioner's case, Thompson's death sentence was predicated on a prior conviction for an unrelated crime resulting from a trial in which prosecutors withheld material, exculpatory evidence. Shortly after he was arrested for the 1985 murder, Thompson was charged with an unrelated armed robbery. *See State* v. *Thompson*, 825 So. 2d 552, 555 (La. Ct. App. 2002). Even though the murder occurred before the robbery, prosecutors tried Thompson on the armed robbery charge first as "part of the strategy of prosecuting Mr. Thompson for the murder." Connick Tr. at 187; *see* Cawthorn, *Lawyers' Digging Earns Death-Row Inmate*

a Reprieve, Phila. Inquirer, June 7, 1999, at A1. Thompson was convicted of armed robbery, and the prosecution used that conviction as an aggravating circumstance in the capital-murder trial. *Thompson*, 825 So. 2d at 555. Because of that prior conviction, Thompson waived his right to testify in his own defense in the capital-murder trial, and he was convicted largely on the testimony of eyewitnesses to the shooting. *Id.* at 555-556; *Thompson*, 131 S. Ct. at 1372 (Ginsburg, J., dissenting).

Eighteen years later, just one month before Thompson's scheduled execution, an investigator working for Thompson's defense team uncovered blood evidence "conclusively prov[ing] that [Thompson] was not the perpetrator" of the armed robbery. *Thompson*, 825 So. 2d at 553. The prosecution had never disclosed this evidence to the defense, despite Thompson's pretrial request for "access to all materials and information 'favorable to the defendant' and 'material and relevant to the issue of guilt or punishment,' as well as 'any results of reports' of 'scientific tests or experiments.'" *Thompson*, 131 S. Ct. at 1372 (Ginsburg, J., dissenting). Upon the discovery of this evidence, an Orleans Parish prosecutor revealed a deathbed confession from his colleague, who indicated that he had intentionally concealed the blood evidence in the armed-robbery case. *See* Bell, *Robbery Case Thrown Out: Assistant District Attorneys Accused of Concealing Bloody Pants, Shoes*, New Orleans Times-Picayune, June 30, 1999, at B1.

Thompson was granted a new trial on the robbery charge, but Connick subsequently dropped the case in light of the newly released exculpatory evidence. Bell, *Connick Kills Robbery Case; Evidence Allegedly Withheld*, New Orleans Times-Picayune, July 1, 1999, at B3 ("Connick promptly threw out the robbery

charge, saying a recent blood test essentially had cleared the man"). The Louisiana Court of Appeal then reversed the murder conviction, concluding that Thompson's "case is more egregious in that it was the State's intentional hiding of exculpatory evidence in the armed robbery case that led to his improper conviction in that case and his subsequent decision not to testify in the instant case because of the improper conviction." *Thompson*, 825 So. 2d at 557.

The Orleans Parish District Attorney's Office retried Thompson for the murder. At the trial, Thompson took the stand in his own defense, and his attorneys presented additional exculpatory evidence regarding the murder that the prosecution had previously withheld. "The newly produced items included police reports describing the assailant in the murder case as having 'close cut' hair, the police report recounting [an eyewitness's] meetings with the [victim's] family, audio recordings of those meetings, and a 35-page supplemental police report." *Thompson*, 131 S. Ct. at 1376 (Ginsburg, J., dissenting) (citation omitted). After deliberating for less than an hour, the jury found Thompson not guilty. *See* Filosa, *N.O. Man Cleared in '84 Murder*. Thompson was released after spending more than eighteen years in prison and surviving eight total execution dates. *Id.*; *see* Bell & Philbin, *Connick Urges Judge To Delay Execution*, New Orleans Times-Picayune, May 1, 1999, at A1.

B. Numerous Defendants Sentenced To Life In Prison Have Been Exonerated Upon The Disclosure Of *Brady* Material Withheld By Orleans Parish Prosecutors

Suppression of key evidence by Orleans Parish prosecutors also has resulted in the wrongful convic-

tions of a number of defendants sentenced to life in prison, who later were exonerated in light of that evidence.

1. Gregory Bright and Earl Truvia each spent more than twenty-seven years in prison after Orleans Parish prosecutors suppressed key evidence in their trial that made the difference between conviction and acquittal. Bright and Truvia were convicted of second-degree murder in 1976 and sentenced to life in prison without parole on the basis of testimony from a single witness. That witness testified that she watched from her window as Bright and Truvia rounded the corner with the victim, she heard shots shortly thereafter, and she saw Bright and Truvia walk back down the street without the victim. *See Earl Truvia*, Innocence Project New Orleans, http://www.ip-no.org/exoneree-profiles/earl-truvia (last visited Aug. 18, 2011); Feemster, *The Wrong Arm of the Law*, Ford Foundation Report, at 29 (Summer 2004), *available at* http://www.fordfoundation.org/pdfs/library/ford_reports_summer_2004.pdf (last visited Aug. 18, 2011).

The prosecution, however, failed to disclose to the defense evidence casting serious doubt on the witness's credibility. The witness suffered from mental illness, including visual and auditory hallucinations; had a history of drug use and prostitution and had testified under a false name to hide her criminal record; and had given police the tip implicating Bright and Truvia in exchange for money. Feemster, *The Wrong Arm of the Law*, at 29. Indeed, the prosecution suppressed a subpoena reflecting that the witness was in a mental hospital on the eve of the trial. *Id.*; *see State* v. *Bright*, No.

252-514, at 3, 5-6 (Orleans Crim. Dist. Ct. Oct. 1, 2002).[7] In addition, the prosecution failed to disclose a police report showing that "the police were pursuing two other suspects prior to the arrest of the defendants, based on information from interviews in the crime scene area" and suggesting "a drug connection as the motive for the shooting." *Bright*, No. 252-514, at 4. Even though these obviously favorable items were in their possession, prosecutors once again "repeatedly asserted either that the defense was not entitled to the information it sought or that the State was not in possession of that material." *Id.*

The Orleans Parish Criminal District Court vacated Truvia's and Bright's convictions and ordered a new trial, finding that, under *Brady*, "the suppression of this evidence ... was unlawful and inexcusable, and denied the defendant[s their] constitutional right to a fair trial." *Bright*, No. 252-514, at 7. With respect to the information regarding the eyewitness's mental health, the court emphasized that "[t]his was a single eyewitness case in which the single eyewitness'[s] credibility as to the most elemental facts (such as her identity) has been brought into serious question." *Id.* at 8. Moreover, the court found that the information regarding other suspects in the police report—which resembles the suppressed evidence suggesting that individuals other than Petitioner committed the murders in this case, *see* Pet. Br. 43-45, 49-54—was "both excul-

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[7] This decision is unreported, but it is publicly available as Attachment B to Truvia's brief in opposition to summary judgment in the subsequent civil action brought against the prosecutors who were responsible for the *Brady* violations. *See Truvia* v. *Julien*, No. 04-cv-680, Dkt. No. 100-2 (E.D. La. May 29, 2007).

patory and material." *Bright*, No. 252-514, at 5. Accordingly, the court held the suppression of such evidence was "sufficient to destroy any confidence in the outcome of the 1976 trial." *Id.* at 6.

On the eve of the retrial, Connick's successor, then-District Attorney Eddie Jordan, dropped the charges against Bright and Truvia in light of the newly disclosed evidence. According to Jordan, "'[t]he way this case was handled by the former district attorney's office is inexcusable[.] The mental condition of the state's sole witness was vital information that should have been shared with the defense.'" Perlstein, *Jordan Drops Charges in 1975 Murder; Two Men Freed on Eve of Retrial*, New Orleans Times-Picayune, June 24, 2003, at B1. Bright and Truvia were released from prison after spending more than twenty-seven years behind bars for their wrongful convictions.

2. Orleans Parish prosecutors' suppression of favorable evidence also led to the wrongful conviction of Isaac Knapper. In 1979, nineteen-year-old Knapper was convicted of capital murder and sentenced to life in prison without parole for the robbery and shooting of a tourist outside a New Orleans hotel. *See State* v. *Knapper*, 579 So. 2d 956, 957-958 (La. 1991). Twelve years later, a police report surfaced indicating that two different men had committed a similar armed robbery of tourists days after the murder using the murder weapon. *Id.* at 958. The police report also revealed that the prosecution's primary eyewitness had given a description of the murderer that differed from the description he gave at trial. *Id.* Similar to the witnesses' accounts of the perpetrators in the suppressed police report in Petitioner's case, *see* Pet. Br. 13-18, such evidence could have been used to impeach the key witness's identification of Knapper at trial.

The Supreme Court of Louisiana found that the prosecution had never disclosed the police report to the defense, and indeed had responded to a pretrial discovery request for exculpatory information, including any police reports, by asserting that the defense was "not entitled" to that information. *Knapper*, 579 So. 2d at 957, 961. Because the police report "contained evidence, both exculpatory and impeachment, favorable to defendant," and because there was "a reasonable probability [such] evidence ..., if it had been disclosed to the defense, would have created a reasonable doubt that did not otherwise exist," the court reversed Knapper's conviction and sentence. *Id.* at 960, 961. The Orleans Parish District Attorney's Office chose not to retry Knapper, and he was released from prison shortly thereafter. *See* Armstrong & Possley, *The Verdict: Dishonor*.

* * *

Amicus does not contend that *every* prosecution by the Orleans Parish District Attorney's Office has been tainted by *Brady* violations. However, the indisputable record shows a greater willingness on the part of Orleans Parish prosecutors during the tenure of District Attorney Harry Connick to disregard or even flout their disclosure duties, particularly in capital cases. In reviewing the undisputed failures of disclosure in this case, the Court should take due account of similar failures in other cases and the fact that, once the full information came to light, the charges were either dropped or ended in acquittal. Amicus respectfully submits that—as Petitioner explains—the withholding of similar favorable, material evidence in this case has likewise undermined confidence in the jury's verdict, and that that is ample reason for finding serious *Brady* violations here.

CONCLUSION

The judgment of the Orleans Parish Criminal District Court should be reversed.

Respectfully submitted.

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